

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF AND APPENDIX FOR APPELLANT'S

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

October Term, 1941

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED OCT 15 1941

No. 8010

Joseph W. Stewart

CLERK

JOHN F. BRADY and ANNE J. BRADY, *Appellants*

v.

MILDRED GAMES, *Appellee*

Appeal from the District Court of the United States
for the District of Columbia

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

April Term, 1941

No. 8010

JOHN F. BRADY and ANNE J. BRADY, *Appellants*

v.

MILDRED GAMES

**Appeal from the District Court of the United States
for the District of Columbia**

BRIEF FOR APPELLANTS

Jurisdictional Statement.

This is an appeal by John F. Brady and Anne J. Brady, defendants below, from a decree entered by the District Court of the United States for the District of Columbia in favor of the plaintiff setting aside a conveyance of real estate and awarding a declaratory judgment in favor of the plaintiff. (Appellants' App. 43).

The District Court had jurisdiction Under Sec. 44, Tit. 18, D. C. Code (Act of March 3, 1901, 31 Stat. 1200, c. 854, Par. 64).

This Court has jurisdiction to review the judgment under Sec. 26, Tit. 18, D. C. Code (Act of March 3, 1901, 31 Stat. 1225, c. 854, Par. 226).

The pleading necessary to show the existence of the jurisdiction is:

1. The Complaint (Appellants' App. 1).

Statement of the Case.

On December 21, 1933, one John F. Brady, the father of the appellant John Francis Brady, and husband of the appellant Anne J. Brady, entered into an agreement with the plaintiff, Mildred Games, (*which agreement was not under seal*), under the terms of which he agreed to make certain cash payments, and also to pay to the said Mildred Games for the support of her infant child, fifty dollars per month during the infancy of the child (Appellants' App. 5). As consideration for the said agreement, the plaintiff released the said Brady from any and all claims, either legal or equitable, which she might have against him.

On September 7, 1934, Brady conveyed to his wife, Anne J. Brady, premises No. 2900 P. St., N. W., Washington, D. C. which had been their home for more than twenty years. On the same day they executed a deed of trust in the sum of One Thousand Dollars (\$1,000.00), which money was turned over to Brady. These deeds were duly recorded in the office of the Recorder of Deeds in the District of Columbia on the same day. On May 1, 1935, the plaintiff, Games, filed suit in the District Court against Brady for breach of promise of marriage, claiming damages. This suit was dismissed on April 29, 1935. On November 6, 1936, Brady died, leaving a will dated February 21, 1930, wherein he gave all of his property to his wife. At the time

of his death, Brady had paid the cash payments called for in the agreement, and had also paid the monthly installments called for under the agreement. On August 4, 1938, the defendant, as executor of the will of John Brady, deceased, rejected a claim which had been probated by the plaintiff, Mildred Games, wherein she claimed the sum of Fifteen Hundred Dollars (\$1500.00), as arrears under the agreement with the deceased. On April 22, 1939, the plaintiff filed this suit against the executor, John Francis Brady, asking for a money judgment against him, and joined the widow, Anne J. Brady, asking that the conveyance of the real estate to her be set aside as fraudulent, and that it be subjected to her claim for the arrears under the agreement, also that she have judgment for the balance to become due.

The complaint sets forth the existence of the agreement, the death of Brady, the date of the conveyance, and the amount claimed to be due.

The defendant, Anne J. Brady, filed a motion to dismiss the complaint as to her, claiming it did not set out a cause of action on which relief could be had (Appellants' App. 9). This motion was overruled (Appellants' App. 11). Each defendant filed a motion for a bill of particulars (Appellants' App. 8-14). These motions were likewise overruled (Appellants' App. 10-15).

At the trial of the case, the execution of the agreement was admitted as well as the amount of arrears. No testimony was offered by the plaintiff as to what claim or claims were released, or what claim or claims the plaintiff had against Brady. The plaintiff admitted that all payments called for by the agreement had been paid up to the time Brady died. Mrs. Games also testified that after signing the agreement she was compelled to sue Brady in the

Municipal Court, and that from then on the payments were made regularly.

The plaintiff also produced her son who testified that at the time of the signing of the agreement and many times afterwards Brady stated that he was going to "fix it" so that Mrs. Games would not get anything. She also produced her maid, Betty Williams (Appellants' App. 54), who testified that *after* signing the agreement, Brady said he would "fix it for her not to get anything."

It was admitted that Brady conveyed the property involved to his wife on September 7, 1934, and that the conveyance was duly recorded in the office of the Recorder of Deeds on the same day.

The plaintiff introduced in evidence the record of a suit filed by her in the Municipal Court, Games v. Brady No. 294402, during August 1934, claiming Three Hundred Thirty-seven Dollars and Fifty Cents (\$337.50), made up as follows:

To arrears due under agreement	\$ 40.00
To meals	40.00
To furniture bill	70.00
To rent for apartment agreed to be paid by the defendant	187.50
	\$337.50

There was a finding in favor of the plaintiff in that case in the sum of Forty Dollars (\$40.00) without indicating what item it represented. On the basis of this record the Court below in its memorandum (Appellants' App. 133), held:

"it appears to me that the question of the validity of the contract sued on was decided in case entitled 'Mildred Games v. J. Frank Brady,' No. 294402 in the Municipal Court of the District of Columbia and is *res adjudicata*."

The evidence further showed that Brady was employed by the Interstate Commerce Commission for a good many years at a salary in excess of Four Thousand Dollars (\$4000.00) per year; that he met the plaintiff in Pittsburgh, Pa. in 1931; that shortly thereafter the plaintiff came to Washington, and from then on Brady was living at her apartment practically all the time; that Mrs. Games had no means of support except a small sum earned by a minor son and the income from rooms she rented for a few months after she had been here several years. The foregoing is a brief summary of the plaintiff's evidence. Both defendants moved the Court to dismiss the complaint, which motions were overruled.

Mrs. Brady testified that prior to the time she came to Washington with her husband, they had lived in Boston, Mass., where he was employed by the Interstate Commerce Commission; that they lived in a house there which had been purchased with funds she inherited from her mother; that when they first came to live in Washington they lived in a hotel; that finally Brady located the house involved with a view to purchasing it as a home. She further testified that she received \$2500.00 for her equity in the house in Boston and to this she added \$1000.00 which she had in a bank at Springfield. With this she made the down payment on these premises of \$3,500.00, the balance of \$5000.00 being represented by a first trust held by the American Security & Trust Co. of Washington. At the time this property was purchased it was put in the name of her husband and continued in his name until the 7th of September 1934. Mrs. Brady also testified that after they moved into the house she rented rooms and still rents rooms, from which she made a good income. In January 1926 Brady informed her that the holders of the first trust wanted their money and that he did not have it. She then

told him that she had some money and would let him have it. This money was in a bank in Massachusetts and was the result of a saving account which she had been building up for a period of about twelve years. She stated that she withdrew this money and deposited it in her bank here on January 6, 1926, and immediately had a certified check issued to the American Security & Trust Co. in the sum of \$5150.00 (Def. Ex. No. 1) which she turned over to Brady, and with this check the first trust note was paid and released. The records from the bank (Appellants' App. 72) were produced to verify this. Mrs. Brady also testified that Brady put no money into the purchase price of the home. She also stated that she never heard of Mrs. Games until May 1, 1935, when a neighbor showed her a clipping from a newspaper regarding a suit for breach of promise which Mrs. Games had filed against Brady. She further testified that she knew nothing about this agreement until after Brady died; that for quite a few years prior to his death they had not lived together as man and wife, and that for about three years prior to his death he did not live at the house. According to Mrs. Brady, in 1934, shortly before the property was transferred to her, Brady had made an attempt to borrow \$1000.00 on the house, but that when she learned of this she refused to sign the trust. It was then that he told her that if she would let him have the money he would deed the house to her.

"He knew that I had paid for the house, and he thought he would square himself—for once." (Appellants' App. 80.)

The foregoing is a fair statement of the testimony on both sides.

There was a demand for a jury trial in this case, which really involved two causes of action. One was a suit for money, which is a law action; the other a suit to set aside

a conveyance of real estate on the grounds of fraud, which is an equity cause. The Court took it upon himself to refuse practically all of the defendants' prayers, and submitted the following questions to the jury:

Question 1. On September 7, 1934, at the time J. Frank Brady executed a deed of premises 2900 P Street, N. W., in this City, to his wife, Anne J. Brady, did he do so with intent to hinder, delay, or defraud the plaintiff, Mildred Games, with respect to her claims or demands under the paper writing signed by the said J. Frank Brady and the said Mildred Games on December 21, 1933?

And the jury, in answer to this question, said "YES".

Question 2. If you find there was an intent on the part of J. Frank Brady to hinder, delay or defraud the plaintiff in respect of her said claims, did his wife, Anne J. Brady, have notice or knowledge of such intent prior to, or at the time of the transfer to her of the aforesaid property?

And the jury, in answer to this question, said "NO".

Question 3. In the purchase of the 2900 P Street property did Mr. Brady use \$3,500 of money belonging to his wife and which had been acquired by her other than from him?

And the jury, in answer to this question, said "NO".

Question 4. In paying off the first trust on said property, was the \$5,150 used for this purpose money which belonged to Mrs. Brady and which had been acquired by her other than from Mr. Brady?

And the jury, in answer to this question, said "NO".

And the Court ratified this finding.

The defendants requested the Court to charge the jury:

"If the jury believes that at the time of the transfer of the property to Mrs. Brady, Mr. Brady was solvent and able to pay his legal and valid obligations, the transfer was not void, not fraudulent, and your verdict should be for the defendants."

"The jury is instructed as a matter of law that there is no evidence in this case that there was any consideration for the contract sued upon, and therefore it is not enforceable in law, and your verdict should be for the defendants." (Appellants' App. 123-125.)

These prayers were refused by the Court. The Court held as a matter of law the contract was a valid and enforceable agreement, and that the burden was on Mrs. Brady to prove that her money was used for the purchase of the property, although there was nothing offered by the plaintiff to contradict or impeach her testimony.

The defendants submitted to the Court certified copies of the birth records of the District of Columbia showing that the child referred to in the agreement was the child of Mildred Games and her husband, Thomas Games (Defendants' Ex. 7-8), and while it is set out in the findings of fact that the plaintiff offered a certified copy of a decree of divorce which had been entered in the Court of Common Pleas of Belmont County, Ohio, dated March 14, 1929, said decree being entitled Mildred Games v. Thomas R. Games, no such decree was ever filed in court nor exhibited to counsel for the defendants.

After the verdict of the jury, the defendants moved the Court to grant a new trial or a rehearing, which motion was denied.

Statute a Rule of Civil Procedure Involved.

Rule of Civil Procedure: Rule 9 (b) :

"In all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other conditions of mind of a person may be averred generally."

Code of Laws for the District of Columbia:

Title 24, Chapt. 12, Sec. 241:

“ * * * No action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued.”

Statement of Points Relied on on Appeal.

(Appellants' App. 47.)

1. The Court erred in denying the motions of the defendants to dismiss the Bill of Complaint.

2. The Court erred in denying the motion of the defendants for a Bill of Particulars.

3. The Court erred in not submitting to the jury the issues of fact properly triable by the jury.

4. The Court erred in refusing to submit to the jury, under proper instructions, the validity of the alleged agreement.

5. The Court erred in refusing to direct a verdict in favor of the defendant, Anne J. Brady.

6. The Court erred in refusing to direct a verdict in favor of the defendant, John Francis Brady.

7. The Court erred in refusing to find that a resulting trust existed in favor of the defendant, Anne J. Brady, by reason of the fact that she paid the entire purchase money of the property involved.

8. The Court erred in its ruling that it was not necessary for the plaintiff to show valuable consideration for the alleged agreement, which agreement admittedly was not under seal.

9. The finding of the Court that the judgment in Municipal Court Case No. 294-402 was *res adjudicata* as to the validity of the so-called agreement was erroneous.

Summary of the Argument.

I.

It was error for the Court below to deny appellants motions to dismiss the bill of complaint or in lieu thereof to refuse to order the plaintiff to furnish a bill of particulars as required by the rules of Court.

II.

It was error for the Court to refuse to require the plaintiff to prove the contract was founded on a legal and valuable consideration.

III.

It was error for the Court to refuse to direct a verdict in favor of the defendant Anne J. Brady.

IV.

It was error for the Court to refuse to grant a directed verdict in favor of the defendant John Francis Brady on the ground the plaintiff was guilty of laches.

V.

It was error for the Court to refuse to find a resulting trust in favor of the defendant Anne J. Brady in view of the fact that the uncontradicted testimony was to the effect that the purchase money for the property was from her sole and separate estate.

VI.

The Court erred in holding that the agreement was *res adjudicata* as a result of the suit in the Municipal Court of the District of Columbia.

Argument.

I.

It was error for the Court below to deny appellants' motions to dismiss the bill of complaint or in lieu thereof to refuse to order the plaintiff to furnish a bill of particulars as required by the rules of Court.

Rule 9 (b) of the Rules of Civil Procedure provides:

"Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

The complaint herein says in the fifth paragraph (Appellants' App. 4) that John Frank Brady, "conveyed all his property, real and personal, to-wit: (describing the real estate) to the defendant, Anne J. Brady, his wife, for the purpose of defrauding the plaintiff and hindering and delay the collection of the indebtedness evidenced by said 'Agreement and Release' above referred to."

Obviously this does not meet the requirements of the Rule of Court, at least, so far as averments of the circumstances constituting the fraud the plaintiff relied on. However, assuming it did, when the defendants asked for bills of particulars, they were entitled to know what theory the plaintiff was proceeding on. The evidence on behalf of the plaintiff clearly shows that at the time of the signing of the so-called agreement the deceased Brady stated that he was going to "fix it" so that the plaintiff would get nothing. The deed transferring the property to Anne J. Brady was openly made, and openly recorded on September 7, 1934. This suit was not filed until April 22, 1939, and no reason is given why the plaintiff did not file her suit immediately after the conveyance.

The Court below having overruled the motion to dismiss and the motions for bills of particulars, there was nothing for the defendant to do but wait until the trial and see what would be developed by the testimony. The agreement and transfer of the property were admitted. The sole ground of the fraud seems to be that while a suit was pending in the Municipal Court, wherein Mrs. Games claimed \$40.00 as arrears under the agreement, as well as meals, rent, and furniture bills, Brady transferred his property. The undisputed testimony is that he needed \$1000.00, and in order to get it he transferred the house to his wife who had paid for it. The Supreme Court of the United States in *Hardt v. Heidmeyer*, 152 U. S. 547, defining the necessary allegations in a complaint for fraud, on page 559, used the following language:

“General allegations that there has been fraud or mistake, or concealment, or misrepresentation, are too loose for purposes of this sort. The charges must be reasonable, definite, and certain as to time, and occasion, and subject-matter. And especially must there be distinct averments of time when the fraud was discovered, how discovered, and what the discovery is; so that the court may clearly see, whether, by the exercise of ordinary diligence the discovery might have been made before. For, if by such diligence the discovery might have been made, the bill has no foundation on which it can stand in equity on account of laches. * * * But the bill does not state what particular discoveries have been obtained, or when they were obtained, or by what inquiries, or in what manner or at what time.”

Certainly under the above test the complaint does not state such a cause of action as should have been allowed to proceed to trial.

II.

It was error for the Court to refuse to require the plaintiff to prove the contract was founded on a legal and valuable consideration.

Prior to the promulgation of the new rules, a plaintiff who sued on a contract was required to allege and prove the contract was based on a valuable consideration. The law is stated in 13 *Corpus Juris* on page 722:

"If the contract in suit is under seal it imports a consideration and none need be alleged; and the same is true if the instrument sued on is negotiable according to the law merchant. * * * But the consideration is an essential part of a contract, and, in the absence of statutory relief from the rule, a party declaring on a contract which at common law does not import a consideration must fully and truly state the consideration as well as the promise founded on it, and must prove it as laid. If no consideration is stated, it is a fatal defect which may be taken advantage of by demurrer, motion in arrest of judgment, or writ of error."

In the case of *Brainard v. Com. Int. Rev.*, 91 Fed. (2nd) the Court said:

"It is elementary that an executory contract, in order to be enforceable, must be based upon a valuable consideration."

However, assuming the rules do not require the plaintiff to plead a valuable consideration, this does not dispose of the necessity of proof. The agreement which the plaintiff relied on was not under seal. The consideration in this agreement was the release of all claims which the plaintiff had against Brady. There was no evidence as to what, if any, claims the plaintiff had, or what if any was released. She did sue Brady afterwards for breach of promise, which would seem to be a breach of the agree-

ment. Brady specifically denied any liability when he signed the agreement.

One who sues on a contract which is based on a forbearance to sue must allege and prove they had a *bona fide* belief in a good cause of action. This is illustrated in *In re Greene*, 45 Fed. (2nd) 428, which is almost on all fours with the present case. There the Court said:

"It is said that the *release* of claims furnishes the necessary consideration. So it would if the claimant had had any claim to release. *But the evidence* shows no vestige of any lawful claim. Release from imaginary claims is not a valuable consideration for a promise. In this connection apparently the claimant testified that the bankrupt had promised to marry her as soon as he was divorced. Assuming that he did—though he denies it—the illegality of any such promise, made while the bankrupt was still married is so obvious that no claim could possibly arise from it, and the release of such claim could not possibly be lawful consideration."

No one can read the testimony in this case and come to any conclusion but that the claimant had been leading a life of adultery with the said Brady; that the basis for the agreement was the result of such illegal cohabitation. This could not supply the necessary consideration for the promise to pay. It is true the agreement purports to release the said Brady from any and all claims, legal and equitable, but in order to make such an agreement binding in law, the plaintiff *must allege and prove the release of a claim recognized in law*. In *Joffe v. Bonn*, 14 Fed. (2d) 50, the Court held that forbearance to prosecute a cause of action is no consideration for a promise unless it is a right honestly asserted. The same is held in *Sherman v. Werby*, 182 N. E. 109; 280 Mass. 157, where the Court said:

“To ground action on forbearance to sue, the plaintiff *must prove bona fide* belief in a good cause of action and reasonable ground of success.”

See also: Stanley v. Sumrall, 147 So. 786, 167 Miss. 714, where the Court held that forbearance to assert a claim, unenforceable, either at law or equity is not sufficient consideration to support a promise. The same is held in Bradstreet v. Crosbie, 253 Pac. 63, 123 Okla. 269; also Bryant v. Bryant, 144 Atl. 904; 295 Pa. 146; Emergency Fleet Corp. v. Turner, 11 Fed. (2nd) 921, holding an agreement not to litigate is not legal consideration for a contract unless a *prima facie* ground for litigation exists.

There was no evidence that would indicate that Brady was under any legal obligation to contribute to the support of the child of the plaintiff, and there being nothing to indicate that the plaintiff released a legal claim, the agreement amounts to nothing more or less than a gift. The mere fact that he made payments according to the agreement does not give it legal force. Suppose Brady had stopped making payments during his lifetime, could Mrs. Games have compelled him to do so without showing what she released? If she could not enforce it against him, she certainly cannot enforce it against his estate.

Judging from the nature of the suit filed in the Municipal Court, it is evident the plaintiff was hounding Brady for money. After making the so-called agreement she claimed in that suit that he owed her for meals, furniture and rent money. Brady was well able to make the monthly payment, but it is not unreasonable that it was in anticipation of unfound claims, such as these and the breach of promise suit that prompted him to place the title to the property where it belonged and which he had a right to do.

III and V.

It was error to refuse to direct a verdict in favor of the defendant, Anne J. Brady.

It was error to refuse to find a resulting trust in favor of the defendant, Anne J. Brady, in view of the fact that the uncontradicted testimony was to the effect that the purchase money for the property was from her sole and separate estate.

Assuming plaintiff offered sufficient testimony to establish the validity of the agreement, was the evidence sufficient to establish a *prima facie* case against Anne J. Brady?

Mrs. Brady testified that she paid the entire purchase price of the property. She established this by documentary evidence and there was nothing to contradict or impeach her testimony. If this was true, she was the equitable owner of the property and it would not be fraudulent for her husband to transfer it to her. In *Robinson v. New York Cent.*, 9 Fed. 877, wherein the Court directed a verdict, and said:

"It is doubtless the general rule that where unimpeached witnesses testify distinctly and positively to facts which are uncontradicted their testimony suffices to overcome a mere presumption."

and in *Felton v. Spiro*, 78 Fed. 576, we find the following language:

"A Federal Court, in which a jury has rendered a verdict has power to set aside such verdict when in its opinion it is contrary to the decided or overwhelming weight of the evidence, and in the exercise of a legal discretion, may properly do so, though the case is not one in which it would have been proper to direct a verdict."

Kelly v. Ins. Co., 75 W. Va. 637, page 644, 84 S. E. 502.

Kelly v. Jackson, 31 U. S. 622, 6 Peters 622.

Hines v. Schaller, L. R. A. 1917 B. 318, 99 Atl. 55.

In *Sudgren v. Stevens*, 86 Kan. 154, 119 Pac. 322, 39 L. R. A. (N. S.) 487, the Court said:

"While the jury are the exclusive judges of the credibility of witnesses, they are not arbitrarily, or from partiality or caprice to disregard uncontradicted and unimpeached testimony, or facts shown beyond question, both by testimony and by admission."

Citing *Leavitt v. Dow*, 105 Me. 50, 72 Atl. 735.

Levis v. N. Y. C. Ry. Co., 99 N. Y. Sup. 462.

In this case the Court did not submit to the jury the issues of fact on the legal action, but took an advisory verdict on specific questions. In the Department of Justice Bulletin No. 117 dated June 11, 1941, Decisions on Federal Rules of Civil Procedure, pages 18 to 23, inclusive, there is an outline of the procedure to be followed in cases where a legal action is joined with an equitable action. The following quotation therefrom is pertinent in this case:

Neither the Rules of Civil Procedure nor the Act, 28 U. S. C. 723, under the authority of which they were prescribed, abolished the fundamental and substantive distinction between actions at law and suits in equity. The distinction, except in matters of procedure, is cautiously maintained. Rights and remedies peculiarly legal retain their inherent characteristics, and rights and remedies peculiarly equitable likewise retain their inherent characteristics. Legal and equitable rights may still be pursued and the respective remedies administered as heretofore, not only in the same form, but in the same proceeding. *Williams v. Collier, et al.*, 32 F. Supp. 321; *Grauman, et al. v. City Company of New York, Inc., et al.*, 31 F. Supp. 172; *Bellavance v. Plastic-Craft Novelty Co., et al.*, 30 F. Supp. 37; *Fraser v. Geist, et al.*, 1 F. R. D. 267; Trial by Jury and the New Federal Rules of Procedure, 45 Yale L. J., 1022; See *Liberty Oil Company v. Gordon National Bank, et al.*, 260 U. S. 235, 242. Causes of action cognizable and remediable in a court of law are triable as jury cases; causes of action cognizable and remediable in a court of equity are triable as non-jury cases.

Here the Court failed to make a distinction between the law case and the equity case. Had this distinction been maintained, it would have been the duty of the Court to direct a verdict in favor of Anne J. Brady at the close of the plaintiff's evidence. In this way the entire matter would have been disposed of. However, the Court so commingled the two actions as to deny to these appellants the right to a jury trial on issues properly triable by a jury.

IV.

It was error for the Court to refuse to grant a directed verdict in favor of the defendant John Frances Brady on the ground the plaintiff was guilty of laches.

The agreement sued on was made on December 21, 1933. This suit was filed on April 22, 1939, over five years later. No contention is made that plaintiff's claim against the executor was barred by the statute of limitations. However, so far as her right to have the conveyance set aside on the grounds of fraud presents another question. This right, if it ever did exist, arose at the time of the conveyance, or within a reasonable time after she knew, or should have known, that Brady had conveyed the property to his wife. In *Hammond v. Hopkins*, 143 U. S. 224, on page 250, the Court said:

"No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of consideration, good faith and reasonable diligence, but will discourage stale demands. * * * The rule is peculiarly applicable where the difficulty of doing entire justice *arises through the death of the principal participants in the transaction complained of*, or of the witness or witnesses, or by being so obscured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, through the lapse of a few years it may be sufficient

to defeat an action in one case, a longer period may be held requisite in another, depending upon the situation of the parties, the extent of their knowledge or means of information, great changes of value, the want of probable grounds for the imputation of fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights and the like."

See also:

March v. Whitmore, 21 Wall. 178.

Lansdale v. Smith, 106 U. S. 391.

Maskall v. Cosilear, 137 U. S. 556.

Hamber v. Moulton, 138 U. S. 486.

In the case of *Hoggin v. Norris*, 136 U. S. 386, which is a leading case on the application of the statute of limitations in equitable actions, the Court said:

"It is part of this general doctrine that to avoid the lapse of time or statute of limitations the fraud must have been one which was concealed from the plaintiff by the defendant, or which was of such a character as necessarily implied concealment. Neither of the principles can apply to the defendant in this case."

"The acts which constitute the fraud as alleged in the bill were open and public acts. *The note and the mortgage were recorded in the proper public office of the proper county.* The possession of the defendants was by judicial proceedings and were open to everybody's examination."

In the present case, according to the testimony of the witnesses for the plaintiff, Brady told her at the time of signing the agreement, and many other times, that he would fix it so that she would get nothing from his estate. Did this put her on notice? Whether it did notify her or not, is she by law charged with notice of the transfer of the property by the recording of the deed? That it was

done openly and properly recorded at the time the deed was executed has been definitely established. The leading case on this subject is *Wood v. Carpenter*, 101 U. S. 135. There, without quoting the entire decision of the Court, to which the attention of this Court is nevertheless invited, we find the following statement:

“Whatever is notice enough to excite attention, and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact he shall be deemed conversant of it * * * *The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have detected it, he seasonably had actual knowledge of it.*

“A party seeking to avoid the bar of the statute on account of fraud *must aver and show* that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it. * * *

“There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself. *The circumstances must be fully stated and proved*, and the delay which has occurred must be shown to be consistent with the requisite diligence.”

See also:

Pearsall v. Smith, 149 U. S. 231.

Brant v. Va. Coal Co., 93 U. S. 326.

Kilbourne v. Southerland, 130 U. S. 505.

Stearns v. Page, 7 Howard, 819-829.

In *Prevost v. Gratz*, 6 Wheaton 498, Justice Story said:

“Fraud or breach of trust ought not lightly be imputed to the living, for the legal presumption is the other way, and as for the dead who are not here to answer for themselves, it would be the height of injustice to disturb their ashes and violate the sanctity

of the grave, unless the evidence of fraud be clear beyond a reasonable doubt."

In *Wheeler v. McNeil*, 101 Fed. 685, Justice Sanborn said:

"Silence, delay, acquiescence, or the use and retention of any of the fruits of the contract for any considerable length of time after discovery of the fraud is in itself an exercise of the option (to rescind) and constitutes an irrevocable ratification of the transaction."

See also:

Grymes v. Saunders, 93 U. S. 55.

Miller v. Rush, 276 Fed. 641.

Goldberg v. Shapiro, 192 U. S. 232.

Richardson v. Walton, 49 Fed. 888.

Longworth v. Hunt, 11 Ohio State 194.

Hellman v. Davis, 24 Neb. 793, 40 N. W. 309.

In *Baker v. Cummings*, 169 U. S. 189, an appeal to the Supreme Court of the United States from the Court of Appeals for the District of Columbia, Chief Justice White outlined the proper time within which one must institute proceedings to set aside a conveyance on the ground of fraud. In that case the Court said:

"Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern actions at law.

"Apart, however, from the bar of the statute of limitations, the facts as to the full knowledge of the fraud, if any existed, by Cummings, more than three years before the filing of his bill debars him from invoking a court of conscience to put him in a much better position than he could have possibly occupied if he had spoken and asserted his rights in due season."

Title 24, Chapter 12, Section 341 of our code provides:

“ * * * And no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued.”

An action to vacate a fraudulent conveyance, brought by a creditor having no specific lien upon the land conveyed, not being an action for the recovery of land or to enforce a lien on land, and no other period of limitation being prescribed therefor, is within this provision of the code. *Eckert v. Wendell* (Tex.), 40 S. W. (2nd) 796, 76 A. L. R. 855, annotated. The following cases in this jurisdiction and other Federal jurisdictions support this doctrine:

Anglo Columbian Co. v. Stapleton, 57 App. D. C. 299.

Hurdle v. Trust Co., 59 App. D. C. 58.

Columbian University v. Taylor, 25 App. D. C. 124.

Washington L. & T. v. Darling, 21 App. D. C. 132.

Childs v. M. K. & T. Ry., 221 Fed. 219.

Kessler v. Ensley Co., 123 Fed. 547 (Page 556).

Potts v. Alexander, 118 Fed. 885.

In determining to what extent the recording of the deed of conveyance was notice of the fraud to the plaintiff, it is well settled that:

“Public records are equivalent to actual knowledge of facts there appearing.”

Stainson v. Stainson, 160 N. W. 237, 40 S. D. 322.

Ft. Peirre v. Hall, 19 S. D. 663, 104 N. W. 104.

Coe v. Sloan, 16 Ia. 49, 100 Pac. 354.

The following cases support the proposition that where the person defrauded, among other possible means of

acquiring knowledge sufficient to put him on inquiry, had the means of discovering the fraud by examining the public records, he cannot plead ignorance of the fraud in order to evade the statute of limitations:

Scruggs v. Decatur Co., 86 Ala. 173, 5 So. 440.

Burling v. Newsland, 39 Pac. 49.

Gebbart v. Sattler, 40 Ia. 152 (1874).

Black v. Black, 64 Kan. 689, 68 Pac. 662.

Edgell v. Smith, 50 W. Va., 349, 40 S. E. 602.

Mickell v. Walraven, 92 Ia. 423, 60 N. W. 633.

This subject is well annotated in 22 L. R. A. (New Series) at page 207.

VI.

The Court erred in holding that the agreement was res adjudicata as a result of the suit in the Municipal Court of the District of Columbia.

The Court below in its memorandum says:

"The contract introduced in evidence recites a valid consideration, namely, a release of a claim. The nature of the claim is not stated. There is no burden on the plaintiff to show the claim was valid, colorable, or one believed to be valid. If wrongful, illegal, without foundation or without belief of validity, the burden of proof is on the party asserting the wrong, illegality or fraud (here the defendant). The law will not presume a wrongful claim was the one released. No evidence having been adduced in any of these regards by the defendant and no illegality appearing on the face of the instrument, the contract must be found to be based on the valid consideration recited.

While by reason of the foregoing, it seems not necessary to decide the point, nevertheless it appears to me that the question of the validity of the contract sued on was decided in case entitled "Mildred Games v. J. Frank Brady," No. 294402 in the Municipal

Court of the District of Columbia and is *res adjudicata*."

In support of this theory the Court cites *Southern Pacific R. R. v. U. S.*, 168 U. S. 1.

That case is authority for the contrary in the light of the facts in this case. There was a judgment in the Municipal Court case in favor of the plaintiff in the sum of \$40.00, without anything to indicate which of the several items the judgment was for. It could have been for the meals sued for, the furniture, rent or the arrears on the agreement. However, the Supreme Court in setting out the test of *res adjudicata* used this language in the case cited by the lower Court:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies."

If this be the test, the Court was in error. There is nothing in the record of the Municipal Court case which would indicate the contract was found to be a valid and enforceable obligation.

For the foregoing reasons these appellants respectfully suggest that the decree entered by the Court below should be ordered vacated and the complaint dismissed.

Respectfully submitted,

WILLIAM B. O'CONNELL,
WILLIAM A. GALLAGHER,
DENNIS COLLINS,
Attorneys for Appellants,
203 Union Trust Building,
Washington, D. C.

APPENDIX.

IN THE

District Court of the United States

FOR THE DISTRICT OF COLUMBIA.

(Filed April 22, 1939, Charles E. Stewart, Clerk.)

MILDRED GAMES, 1416 R. Street, N. W.,
Washington, D. C.,

Plaintiff,

vs.

JOHN FRANCIS BRADY, Administrator *c. t. a*
of the Estate of JOHN FRANK BRADY,
1 deceased, 2900 P Street, N. W.,
Washington, D. C.

and

ANNE J. BRADY, 2900 P Street, N. W. Wash-
ington, D. C.,

Defendants.

Civil Action
No. 2508.

Complaint on Claim for Debt and to Set Aside Fraudulent Conveyance.

1. The amount of plaintiff's claim is in excess of One Thousand Dollars (\$1000.00) besides interest and costs and is therefore in the jurisdiction of this Court.

2. The defendant, John Francis Brady, is the Administrator *c. t. a* of the Estate of John Frank Brady, who departed this life, testate, in the District of Columbia, to-wit,

on the 6th day of November, A. D. 1936 and is sued as such. Said decedent left his last will and testament dated February 21, 1930, which will was duly admitted to probate and record as a will of both real and personal property in the District Court of the United States for the District of Columbia, Administration No. 53426 and letters *c. t. a.* on said estate were duly issued to defendant, John Francis Brady, son of said decedent, on June 22, 1938.

3. Said John Frank Brady, deceased, mentioned in paragraph 2 above, during his life time, to-wit, on the 21st day of December, A. D. 1933, made and entered into with the plaintiff and executed and delivered to the plaintiff, Mildred Games, a certain written "AGREEMENT AND RELEASE", a photostatic copy of which is hereto annexed as Exhibit A; whereby said John Frank Brady, by the name of J. F. Brady, promised and agreed to pay to the plaintiff, Mildred Games, \$750.00, consisting of \$500.00
 2 in cash and \$250.00 in promissory notes, and in consideration of monthly payments to her by him of \$50.00 per month, beginning \$50.00 on January 15, 1934 and \$50.00 on the 15th day of each and every month thereafter for the support of plaintiff's child, namely, Jeanne Frances Games, minor born on November 17, 1932 during the minority of said child and said monthly payments to cease and determine at the 21st birthday of said child or at the death of said child. And in consideration of the payment of said \$500.00 in cash and the \$250.00 in promissory notes aforesaid and in consideration of the promise and agreement of said John Frank Brady to make the \$50.00 monthly payments aforesaid to the plaintiff, Mildred Games, as aforesaid, the plaintiff released and discharged said John Frank Brady, of any and all claims, at law or in equity, which she then had or ever had against him on her own behalf or on behalf of her said child.

4. Said "Agreement and Release" is still in full force and effect and said John Frank Brady paid the \$500.00 cash payment aforesaid and the \$250.00 in promissory notes aforesaid and made the \$50.00 monthly payments aforesaid up to and including October 15, 1936. He died on November 6th 1936 and no further payments have been made under said "Agreement and Release" and the said monthly payments of \$50.00 each due November 15, 1936 to and including April 15, 1939—30 months at \$50.00 per month amounting to \$1500.00 are now overdue and unpaid and there is now justly due and owing to the plaintiff by the defendant, John Francis Brady, Administrator *c. t. a.* of the Estate of said John Frank Brady, deceased, the sum of \$1500.00 and interest, exclusive of all set offs and just grounds of defense. Plaintiff probated her claim against said estate but her claim was rejected by letter dated August 4, 1938 signed by Wm. B. O'Connell, Attorney for John Frank Brady, Administrator *c. t. a.* of said estate. The plaintiff is now bringing this Civil Action to enforce her claim aforesaid within the nine months after rejection

as provided by statute in force in the District of
 3 Columbia. Under said "Agreement and Release" in addition to the \$1500.00 and interest aforesaid now overdue and unpaid additional monthly payments of \$50.00 per month are owing and will become due and payable, beginning May 15, 1939 to and including November 15, 1953—175 months at \$50.00 per month amounting to \$8750.00 unless said child shall die before her 21st birthday on November 17, 1953 in which case said monthly payments will cease and determine at her death. Plaintiff includes in this Civil Action her claims for said additional monthly payments in the sum of \$8750.00 owing her by defendant, John Francis Brady, Administrator *c. t. a.* of the Estate of said John Frank Brady, deceased.

5. Said John Frank Brady, deceased, by the name of J. Frank Brady, during his life time, on or about September 7, 1934 conveyed all his property, real and personal, to-wit:

“Lot numbered Two Hundred and Twelve (212) in Danenhower's Subdivision of lot numbered Two Hundred and six (206) in Square numbered Twelve Hundred and fifty-eight (1258) formerly Square numbered Eighty-eight (88), in “Georgetown”, as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber A. R. S. at folio 251; subject to the right of way over the rear three (3) feet of said lot for the use of lots numbered, 210 to 213 in said Subdivision; subject to a deed of trust on said property for the sum of \$1000.00”.

to defendant, Anne J. Brady, his wife, for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by said “Agreement and Release” above referred to. Said deed from J. Frank Brady to Anne J. Brady, his wife, is dated September 7, 1934 and recorded September 7, 1934 in Liber 6823 at folio 413, of the Land Records of the District of Columbia. The ground is assessed at \$2499.00 and the improvements at \$6600.00 or a total assessed value of \$9099.00 for said property.

Wherefore plaintiff demands:

(1) That the plaintiff have judgment against the defendant, John Francis Brady, Administrator *c. t. a.* of the Estate of John Frank Brady, deceased, for Fifteen
4 Hundred Dollars (\$1500.00) and interest and also for said \$8750.00 owing but not yet due and payable under said “Agreement and Release”; (2) that the aforesaid conveyance to defendant, Anne J. Brady, be declared void and the judgments herein be declared a lien on said

property; (3) that the plaintiff have judgment against the defendants for costs; (4) and for such other and further relief as the nature of the case may require and to the Court may seem just and proper.

GEORGE A. MADDOX,
 GEORGE AMORY MADDOX,
Attorney for the Plaintiff,
 1118 Woodward Building,
 Washington, D. C.

DEMAND FOR JURY TRIAL.

Plaintiff demands trial by jury on all of the issues herein.

GEORGE A. MADDOX,
 GEORGE AMORY MADDOX,
Attorney for the Plaintiff,
 1118 Woodward Building,
 Washington, D. C.
 Phone—National 5657.

Exhibit A.

(Filed April 22, 1939, Charles E. Stewart, Clerk.)

AGREEMENT AND RELEASE.

For and in consideration of the payment to me of the sum of Seven Hundred and Fifty Dollars (\$750.00), constituting \$500.00 in cash, and \$250.00 in promissory notes, receipt of which is hereby acknowledged, and in
 5 consideration of the payments monthly to be made as hereinafter set forth, I, Mildred Games, of Washington, D. C., hereby release, discharge and acquit J. F. Brady of Washington, D. C., of any and all claims, at

law or in equity, which I now have or have ever had against him, on my own behalf or on behalf of my child,

PROVIDED, that starting January 15, 1934, and regularly on the 15th day of each month thereafter, he shall provide for the support of said child by a payment to me of the sum of Fifty Dollars (\$50.00), each month, and provided further, that in the event the said J. F. Brady at any time in the future desires to insure said payment against the contingency of his death, that such premiums as shall be paid on said policy to be made for my benefit, for said support of said child, shall be deductible *pro rata* monthly, from the said \$50.00 per month payment, provided further that such policy shall not be in any amount more than \$10,000.00 face value.

I hereby covenant and agree that I will use said monthly contribution for the welfare and upbringing of said child, and in the event that this covenant is violated, then and in that event this contract shall be null and void as to future payments, but the release herein given shall continue in full force and effect and shall forever estop me from further claims, in the event that the promissory notes aforesaid are paid according to their tenor, otherwise this release to be null and void.

It is mutually understood and agreed that said monthly payments shall be only for the period of the minority of said child and shall cease and determine at the 21st birthday of said child or at the death of said child.

I hereby agree that this release of obligation of said J. F. Brady shall be full and complete of all claims which have accrued in the past to me of whatever nature and description and it is further expressly understood and agreed that the said J. F. Brady by consent to this

agreement shall not be construed to have made any admission detrimental to his interest and that said J. F. Brady denies any liability in the premises.

In witness whereof, I have hereunto set my hand and seal, in triplicate, at Washington, this 21st day of December, 1933.

MILDRED GAMES.

Witness:

DANIEL S. RING.

Reserving all rights and denying liability and without prejudice insofar as admissions detrimental to any right of mine contained in the above are concerned, I hereby agree, in consideration of the above release to make the payments of the sum of \$50.00 monthly and of the notes according to their tenor, in accordance with the terms and conditions of the above agreement and release.

J. F. BRADY.

Witness:

DANIEL S. RING.

Motion for Bill of Particulars.

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

(Filed May 1, 1939, Charles E. Stewart, Clerk.)

MILDRED GAMES, 1416 R Street, N. W.,
Plaintiff,

vs.

JOHN FRANCIS BRADY, Administrator, *c.t.a.*
of the Est. of JOHN FRANK BRADY, dec'd,
2900 P St., N. W., ANNE J. BRADY, 2900
P. St., N. W.,

Defendants.

Civil Action,
No. 2508.

Now comes the defendant, John F. Brady, and moves
the Court to require the plaintiff to furnish him
6 with a bill of particulars setting forth in detail
the consideration for the agreement and release at-
tached to the complaint.

WM. B. O'CONNELL,
Attorney for the Defendant,
416 Fifth Street, N. W.,
Washington, D. C.

Motion to Dismiss.

**DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.**

(Filed May 1, 1939, Charles E. Stewart, Clerk.)

MILDRED GAMES, 1416 H Street, N. W.,
Plaintiff,

vs.

JOHN FRANCIS BRADY, Administrator, *c..t.a.*
of the Est. of JOHN FRANK BRADY, dec'd,
2900 F St., N. W., ANNE J. BRADY, 2900
P St., N. W.,
Defendants.

Civil Action,
No. 2508.

Now comes the defendant, Anne J. Brady, and moves
the Court as follows:

- 7 1. To dismiss the action because the complaint
fails to state a claim against the defendant upon
which relief can be granted.

WM. B. O'CONNELL,
Attorney for the Defendant,
416 Fifth Street, N. W.,
Washington, D. C.

10 **Order Denying Motion for Bill of Particulars.**

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

(Filed May 11, 1939, Charles E. Stewart, Clerk.)

MILDRED GAMES, 1416 R Street, N. W., D. C.,
Plaintiff,

vs.

JOHN FRANCIS BRADY, Administrator, *c. t. a.*
of the Estate of JOHN FRANK BRADY, de-
ceased, 2900 P Street, N. W., D. C.,
and

ANNE J. BRADY, 2900 P Street, N. W., D. C.,
Defendants.

Civil Action
No. 2508.

Upon consideration of the MOTION FOR A BILL OF PARTICULARS filed herein on the 1st day of May, A. D. 1939 by the defendant, John Francis Brady, Administrator *c. t. a.* of the Estate of John Frank Brady, deceased, to require the plaintiff to furnish him with a bill of particulars setting forth in detail the consideration for the agreement and release attached to the complaint, and of the points and authorities in support thereof and of the points and authorities in opposition thereto and after oral argument by counsel, it appearing to the satisfaction of the Court that the complaint and agreement and release attached thereto aver the consideration with sufficient definiteness to enable said defendant to properly prepare his responsive pleading, it is by the Court this 10th day of May, A. D. 1939,

ADJUDGED, ORDERED AND DECREED, That the said MOTION FOR BILL OF PARTICULARS be and the same hereby is denied.

By THE COURT,
JOSEPH W. COX,
Justice.

11 **Order Denying Motion to Dismiss.**

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

(Filed May 11, 1939, Charles E. Stewart, Clerk.)

MILDRED GAMES, 1416 R Street, N. W., D. C.,
Plaintiff,

vs.

JOHN FRANCIS BRADY, Administrator *c. t. a.*
of the Estate of JOHN FRANK BRADY, de-
ceased, 2900 P Street, N. W., D. C.,
and

ANNE J. BRADY, 2900 P Street, N. W., D. C.,
Defendants.

Civil Action
No. 2508.

Upon consideration of the MOTION TO DISMISS filed herein on the 1st day of May, A. D. 1939 by the defendant, Anne J. Brady, on the ground that the complaint fails to state a claim against her upon which relief can be granted, and of the points and authorities in support thereof, and of the points and authorities in opposition thereto and after oral argument by counsel, it appearing to the satisfaction of the Court that the complaint states a claim against said

defendant upon which relief can be granted, it is by the Court this 10th day of May, A. D. 1939.

ADJUDGED, ORDERED AND DECREED, That the said MOTION TO DISMISS be and the same hereby is denied.

By THE COURT,
JOSEPH W. COX,
Justice.

12

Answer to Complaint.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

(Filed May 12, 1939, Charles E. Stewart, Clerk)

MILDRED GAMES,

Plaintiff,

vs.

JOHN FRANCIS BRADY, etc.,
and

ANNE J. BRADY,

Defendants.

Civil Action,
File No. 2508.

Now comes the defendant, John Francis Brady, Administrator *c. t. a.* of the state of John Frank Brady, deceased, and for answer to the Complaint herein says:

Defense No. 1.

The Complaint fails to state a claim against the defendant upon which relief can be granted.

Defense No. 2.

This defendant denies that the so-called release and agreement referred to in the Complaint is a valid and subsisting obligation against this defendant.

Defense No. 3.

This defendant denies that there was any valid or legal consideration for the alleged agreement and release referred to in the Complaint.

Defense No. 4.

This defendant denies that as Administrator *c. t. a.* of the estate of the said John Frank Brady, deceased he is indebted to the plaintiff in any sum whatsoever.

W. M. O'CONNELL,

WM. B. O'CONNELL,

Attorney for the Defendant,

416 Fifth Street, N. W.,

Washington, D. C.

Motion for Bill of Particulars.

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

(Filed May 12, 1939, Charles E. Stewart, Clerk.)

MILDRED GAMES,

Plaintiff,

vs.

JOHN FRANCIS BRADY, Administrator *c. t. a.*
of the Estate of JOHN FRANK BRADY, de-
ceased,

and

ANNE J. BRADY,

*Defendants.*Civil Action,
File No. 2508.

Now comes the defendant, Anne J. Brady, and moves the Court to require the plaintiff to furnish her with a bill of particulars setting forth in detail the acts of fraud alleged in paragraph Five of the Complaint Filed herein.

W. B. O'CONNELL,
WM. B. O'CONNELL,
Attorney for Defendant,
416 Fifth Street, N. W.,
Washington, D. C.

17 Order of Court Denying Motion for Bill of Particulars.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

(Filed May 23, 1939, Charles E. Stewart, Clerk.)

MILDRED GAMES, 1416 R Street, N.W., D. C.,

Plaintiff,

vs.

JOHN FRANCIS BRADY, Administrator *c. t. a.*

of the Estate of JOHN FRANK BRADY,
dec'd, 2900 P. Street, N. W., D. C.,

and

ANNE J. BRADY, 2900 P Street, N. W., D. C.,

Defendants.

Civil Action
No. 2508.

Upon consideration of the Motion for Bill of Particulars filed herein on May 12, 1939, by defendant, Anne J. Brady, to require the plaintiff to furnish her with a bill of particulars setting forth in detail the acts of fraud alleged in paragraph five of the Complaint filed herein and of the points and authorities in support thereof and of the points and authorities in opposition thereto, the Court finds that as to the averments of fraud, the circumstances constituting fraud are stated with particularity in the Complaint and the "Agreement and Release" attached hereto and made a part thereof, and it is by the Court this 23rd day of May, A. D. 1939,

ADJUDGED, ORDERED AND DECREED, That the said Motion for Bill of Particulars be and the same is hereby denied.

BY THE COURT,
JOSEPH W. COX,
Justice.

18

Answer to Complaint.

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

(Filed May 31, 1939, Charles E. Stewart, Clerk.)

MILDRED GAMES,

Plaintiff,

vs.

JOHN FRANCIS BRADY, etc.,

ANNE J. BRADY,

Defendants.

Civil Action
No. 2508.

Comes now the defendant, Anne J. Brady, and for answer to the complaint filed herein says:

First Defense.

The Complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense.

The claim of the plaintiff is barred by the Statute of Limitations for the reason that the right of action did not accrue within three years before the commencement of this action.

Third Defense.

The claim of the plaintiff is barred by reason of the fact that it is *res adjudicata* as appears from the case of Games v. Brady, Equity Cause No. 67140 in the District Court of the United States for the District of Columbia.

Fourth Defense.

The claim of the plaintiff shows on its face that plaintiff has been guilty of laches and for this reason is not entitled to maintain this claim.

Fifth Defense.

The plaintiff is not a proper party to bring this action because it is not alleged nor claimed that the Administrator *c. t. a.* of the Estate of John Frank Brady, deceased, has failed or refused to take action to avoid the conveyance referred to in the complaint.

Sixth Defense.

The complaint fails to state any facts indicating that this defendant had knowledge of or was a party to a fraud of any kind or character.

19

Seventh Defense.

The complaint fails to state that the said John Frank Brady did not have sufficient assets at the time of his death to satisfy any just claims against his estate.

Eighth Defense.

That the alleged claim of the plaintiff is founded upon a void and illegal contract.

Ninth Defense.

That the defendant purchased the property referred to in the complaint for a valuable consideration, and that the defendant was and at all times after the original purchase of the property, the equitable owner thereof by reason of the fact that she, from her own personal estate, paid the entire purchase price for the said property.

WM. B. O'CONNELL,
WM. B. O'CONNELL,
Attorney for Anne J. Brady,
416 Fifth St., N. W.,
Washington, D. C.
District 6666.

123

Defendant's Prayers.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

(Filed January 27, 1941, Charles E. Stewart, Clerk.)

GAMES,

v.

BRADY.

Civil Action No. 2508.

I.

The jury is instructed to return a verdict for the defendants.

Refused.

II.

If the jury believes that at the time of the transfer of the legal title to Mrs. Brady, she took title in good faith and for a valuable consideration, the transfer to her was not fraudulent and your verdict must be for the defendants.

Refused.

III.

If the jury believes that the money paid for the property known as 2900 P St., N. W., was, as testified to by Mrs. Brady, her own money and not the money of Mr. Brady, your verdict should be for the defendants.

Refused.

IV.

If the jury believes that at the time of the transfer of the property to Mrs. Brady, Mr. Brady was solvent and able to pay his legal and valid obligations, the transfer

was not void, nor fraudulent, and your verdict should be for the defendants.

Refused.

V.

Even if the jury believes that Mr. Brady, at the time of the transfer of the property in question, intended by such transfer to prevent the plaintiff from asserting a claim against such property, before you can return a verdict for the plaintiff you must further find that the property in fact belonged to him at the time of such transfer, and that his wife, Mrs. Brady, took title to it in bad faith,—that is, with knowledge that Mrs. Games had a valid claim against Mr. Brady at that time, and did not pay a valuable consideration for the property.

Refused.

VI.

124 The jury is instructed that the contract introduced in evidence by the plaintiff was terminated by the death of Mr. Brady; and only the indebtedness, if you find that there was any indebtedness, existing at the time of Brady's death is chargeable against his estate or property, and such amount is the limit of any recovery which the plaintiff may have in this cause. And if you find that there was no such indebtedness at the time of his death, then your verdict should be for the defendants.

Refused.

VII.

The jury is instructed that the evidence in this case must satisfy you that there was a valid and valuable consideration for the contract between the plaintiff and the deceased,

J. Frank Brady, and you are instructed that if you find that there was no such consideration your verdict should be for the defendants.

Refused.

VIII.

125 The jury is instructed that if they believe from the evidence that the property at 2900 P St., N. W., was purchased by funds furnished by the defendant Mrs. Anne J. Brady, and that she claimed to be entitled to have it transferred to her, and if her husband made the conveyance to her in recognition of the fact that the home had been purchased by her and was claimed to be hers, rather than in an attempt to hinder, delay, or defraud the plaintiff, then the conveyance was not with intent to defraud, and your answer to the 1st Question should be "No."

(Granted as amended.)

IX.

The jury is instructed as a matter of law that there is no evidence in this case that there was any consideration for the contract sued upon, and therefore it is not enforceable in law, and your verdict should be for the defendants.

Refused.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

Filed Jan. 27, 1941, Charles E. Stewart, Clerk.

MILDRED GAMES,

vs.

JOHN FRANCIS BRADY, Administrator *c. t. a.*
of the Estate of JOHN FRANK BRADY, de-
ceased.

ANNE J. BRADY.

Civil Action
No. 2508.

This cause having come on for hearing on the 24th day of January, 1941, before the Court and a jury of good and lawful persons of this district, to wit:

Charles F. Schneider	Francis C. Heigle
Howard E. Shearer	Harry W. Finney
Paul V. B. Heiss	Thomas P. Hickman
William M. Cutler	Joseph Reichgut
Harry C. Kleinschmidt	Thomas L. Tinsley
John R. Evans, Jr.	Edward G. Lauterbach

who, after having been duly sworn to well and truly answer the interrogatories propounded to them, and after this cause is heard and given to the jury in charge, they upon their oath answer the said interrogatories as follows, this 27th day of January, 1941:

1. On September 7, 1934, at the time J. Frank Brady executed a deed of premises 2900 P Street, N. W., in this City to his wife, Anne J. Brady, did he do so with intent to hinder, delay or defraud the plaintiff, Mildred Games, with respect to her claims or demands under the

paper writing signed by the said J. Frank Brady and the said Mildred Games on December 21, 1933?

Answer: Yes.

(IN THE event your answer to the foregoing question is "NO", it is not necessary to answer question No. 2. However, if your answer to the foregoing question is "YES", you will then make answer to question No. 2)

2. If you find there was an intent on the part of J. Frank Brady to hinder, delay or defraud the plaintiff in respect of her said claims, did his wife, Anne J. Brady, have notice or knowledge of such intent prior to, or at the time of, the transfer to her of the aforesaid property?

Answer: NO.

127 (Answer the following questions regardless of how you shall answer the first question):

3. In the purchase of the 2900 P Street property did Mr. Brady use \$3,500 of money belonging to his wife and which had been acquired by her other than from him?

Answer: NO.

4. In paying off the first trust on the said property, was the \$5,150 used for this purpose money which belonged to Mrs. Brady and which had been acquired by her other than from Mr. Brady?

Answer: NO.

CHARLES E. STEWART, *Clerk.*
by JAMES C. TOOMEY,
Assistant Clerk.

by direction of
JUSTICE LAWS.

128 **Motion to Set Aside Verdict and for Judgment
or for a New Trial.**

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

(Filed Feb 3 1941 Charles E. Stewart, Clerk)

MILDRED GAMES,

Plaintiff,

vs.

JOHN FRANCIS BRADY, *et al.*,

Defendant.

Civil Action No. 2508.

To:

John C. Shaw, Esq.,
Robert H. Hunter, Esq.,
Woodward Building,
Washington, D. C.

Please take notice that on the 7th day of February, 1941, at 10:00 A. M., or at such other time as the Court may fix, the defendants will move the court for an order setting aside the verdict herein and for judgment in accordance with defendants' motion for a directed verdict, or in the alternative, for a new trial on the following grounds:

1. The verdict of the jury in response to questions Nos. 1, 3 and 4, as propounded by the Court was contrary to the evidence and to the weight of the evidence.

2. The plaintiff failed to establish the cause of action alleged in the complaint.

3. The evidence failed to establish the existence of the contract relied upon by the plaintiff as a valid legal obligation.

4. The evidence failed to establish fraud on the part of the deceased, J. Frank Brady, in that there was no evidence

that the property transferred by him to the defendant, Anne Brady, was such a substantial portion of his assets as to leave him without sufficient assets to fully perform the alleged contract if the same had been a valid and binding legal obligation.

129 5. The evidence failed to establish that Anne J.

Brady was not a *bona fide* owner of the real estate in question, for value and without notice.

6. The evidence established, without contradiction, that Anne J. Brady was entitled to the transfer of title of the property in question to her from the deceased J. Frank Brady by reason of a resulting trust arising from the payment of the purchase price of the property by her from her separate estate.

7. There was no evidence whatever that the minor child referred to in the alleged contract in question was not the legitimate off-spring of the plaintiff, and the presumption of law is that such child was legitimate.

8. There was no evidence whatever to establish the said child was the illegitimate off-spring of the deceased J. Frank Brady.

9. That in the absence of evidence of such illegitimacy, it was error to permit counsel for plaintiff to argue to the jury that J. Frank Brady, the deceased, was legally responsible for the support and maintenance of such child, especially in view of the legal presumption, and the absence of proof to the contrary, that such child was in fact legitimate.

10. That the Court erred in refusing to grant instructions prayed by the defendants.

11. That the Court erred in submitting this cause to the jury, there being no evidence to support a finding for the plaintiff upon any issue properly raised by the pleading.

12. The plaintiff was guilty of laches in bringing this action.

13. The claim of the plaintiff is barred by the Statute of Limitation, which defense was pleaded in the 2nd defense of the defendants.

130 14. The evidence of the defendants establishing a resulting trust was not improbable nor inconsistent, and was not contradicted or discredited and the decided weight and preponderance of such evidence, not depending solely on oral evidence, but supported by documentary proof and uncontroverted by any testimony whatever established the existence of such trust, and the findings of the jury as to question three and four being contrary to such evidence, such verdict should be set aside, and a proper finding made by the Court.

15. That under the evidence in this case it is the duty of the Court to enter an order dismissing the complaint and to make findings of fact and conclusions of law in accordance with the evidence and to set aside and disregard the verdict of the jury with respect to questions number one, three and four as submitted, and for other reasons apparent on the face of the record.

W. B. O'CONNELL,
WM. B. O'CONNELL,
WM. A. GALLAGHER,
WM. A. GALLAGHER,
Attorneys for Defendant,
203 Union Trust Bldg.
NA. D076.

Copy received this 3rd day of February, 1941.

John C. Shaw,
Attorney for Plaintiff.

Memorandum.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

MILDRED GAMES,

Plaintiff,

vs.

JOHN FRANCIS BRADY, *et al.*,
Defendants.

Civil Action No. 2508.

Filed

Apr 4 1941

Charles E. Stewart, Clerk

The contract introduced in evidence recites a valid consideration, namely, release of a claim. The nature of the claim is not stated. There is no burden on plaintiff to show the claim was valid, colorable, or one believed to be valid. If wrongful, illegal, without foundation or without belief of validity, the burden of proof is on the party asserting the wrong, illegality or fraud (here the defendant.) The law will not presume a wrongful claim was the one released. No evidence having been adduced in any of these regards by the defendant and no illegality appearing on the face of the instrument, the contract must be found to be based on the valid consideration recited.

While by reason of the foregoing, it seems not necessary to decide the point, nevertheless it appears to me that the question of the validity of the contract sued on was decided in case entitled "Mildred Games v. J. Frank Brady," No. 294402 in the Municipal Court of the District of Columbia and is *res adjudicata*. The Municipal Court was a court of competent jurisdiction over the subject matter and the parties, the litigation was between same parties as here (except here one party to the contract having died, his legal representative appears); final judgment

on the contract here sued upon was rendered by the Municipal Court after a motion in arrest of judgment on the ground that the agreement sued on was illegal and without legal consideration had been overruled. A review of the case by the United States Court of Appeals was not sought; but on the contrary the judgment of the Municipal Court was paid. It, therefore, seems the validity of the same contract may not again be brought into controversy here.

134 Southern Pacific R. R. v. U. S., 168 U. S. 1.

Laches on part of plaintiff is not established by the evidence. All rights claimed by plaintiff under contract were paid until death of party to contract, which occurred on November 6, 1936. Suit was filed herein on April 22, 1939. No prejudice to defendants ensued by the delay of twenty-nine months.

Therefore, after study of briefs and considering finding of facts by jury, I find judgment should be for plaintiff. Before entry of judgment, however, findings of fact with reference to Municipal Court suit, payment judgment and possibly other undisputed facts should be submitted to supplement advisory findings of fact by jury.

BOLITHA J. LAWS,
Justice.

April 4, 1941

135 Findings of Fact and Conclusions of Law.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

(Filed, Jun. 9, 1941, Charles E. Stewart, Clerk)

MILDRED GAMES,

Plaintiff,

vs.

JOHN FRANCIS BRADY, *et al.*,*Defendants.*Civil Action
No. 2508

This Cause came on for hearing at this term of Court and thereupon upon consideration thereof, the Court makes the following Findings of Fact and Conclusions of Law, this 9th day of June, 1941.

Findings of Fact.

1.

The plaintiff and decedent, J. Frank Brady, entered into a written agreement on to-wit, December 21, 1933, said agreement being as follows:

AGREEMENT AND RELEASE.

For and in consideration of the payment to me of the sum of Seven Hundred and Fifty Dollars (\$750.00), constituting \$500.00 in cash, and \$250.00 in promissory notes, receipt of which is hereby acknowledged, and in consideration of the payments monthly to be made as hereinafter set forth, I, Mildred Games, of Washington, D. C., hereby release, discharge and acquit J. F. Brady of Washington D. C., of any and all claims, at law or in equity, which I now have or have ever had against him, on my own behalf or on behalf of my child,

PROVIDED, that starting January 15, 1934, and regularly on the 15th day of each month thereafter, he shall provide for the support of said child by a payment to me of the sum of Fifty Dollars (\$50.00), each month, and provided further, that in the event the said J. F. Brady at any time in the future desires to insure said payment against the contingency of his death, that such premiums as shall be paid on said policy to be made for my benefit, for said support of said child, shall be deductible pro rata monthly, from the said \$50.00 per month payment, provided further that such policy shall not be in an amount more than \$10,000.00 face value.

I hereby covenant and agree that I will use said monthly contribution for the welfare and upbringing of said child, and in the event that this covenant is violated, then and in that event this contract shall be null and void as to future payments, but the release herein given shall continue in full force and effect and shall forever estop me from further claims, in the event that the promissory notes aforesaid are paid according to their tenor, otherwise this release to be null and void.

136 It is mutually understood and agreed that said monthly payments shall be only for the period of the minority of said child and shall cease and determine at the 21st birthday of said child or at the death of said child.

I hereby agree that this release of obligation of said J. F. Brady shall be full and complete of all claims which have accrued in the past to me of whatever nature and description and it is further expressly understood and agreed that the said J. F. Brady by consent to this agreement shall not be construed to have

made any admission detrimental to his interest and that said J. F. Brady denies any liability in the premises.

In witness whereof, I have hereunto set my hand and seal, in triplicate, at Washington, this 21st day of December, 1933.

(signed) MILDRED GAMES.

Witness:

(sgd.) DANIEL S. RING

Reserving all rights and denying liability and without prejudice insofar as admissions detrimental to any right of mine contained in the above are concerned, I hereby agree, in consideration of the above release to make the payments of the sum of \$50.00 monthly and of the notes according to their tenor, in accordance with the terms and conditions of the above agreement and release.

(signed) J. F. BRADY.

Witness:

(sgd.) DANIEL S. RING.

No evidence other than the agreement itself was introduced by either litigant to show the consideration upon which the said agreement was based.

2.

That up until the time of the death of said J. Frank Brady on to-wit November 6, 1936, said J. Frank Brady had made all payments in accordance with the terms of said agreement, and that since the date of his death no payments have been made.

3.

That on, to-wit, September 7, 1934, subsequent to the execution of the aforementioned agreement by and between the plaintiff and the said J. Frank Brady, deceased, and while an action was pending against said J. Frank Brady in the Municipal Court of the District of Columbia being entitled Mildred Games vs. J. Frank Brady, Municipal Court #B 294-402, said suit being filed in the Municipal

137 Court on, to-wit, August 6, 1934 for, among other things, collection of delinquent payments under the aforementioned contract said J. Frank Brady, deceased, transferred title to certain realty known and described as:

“Lot numbered 212 in Danenhower’s Subdivision of lot numbered 206 in Square numbered 1258 formerly square numbered 88 in ‘Georgetown,’ as per plat recorded in the office of the Surveyor for the District of Columbia in Liber A. R. S. at folio 251; subject to the right of way over the rear three feet of said lot for the use of lots numbered 210 to 213 in said subdivision; subject to a deed of trust on said property for the sum of \$1,000.00, to his wife, Anne J. Brady; ‘without consideration’.”

The record of the Municipal Court of the District of Columbia on the aforementioned suit, viz Mildred Games vs. J. Frank Brady being Municipal Court #B 294-402 was introduced into evidence and the record of said suit reflects the following:

AFFIDAVIT OF MERIT.
IN THE MUNICIPAL COURT OF THE DISTRICT
OF COLUMBIA.

MILDRED GAMES,
814 22nd St., N. W.,

Plaintiff,

vs.

J. FRANK BRADY,
Interstate Commerce Commission,
Defendant.

Law No. 294-402

Mildred Games, being first duly sworn, on oath deposes and says that she is the plaintiff in the above entitled cause. That the defendant is justly indebted to her in the full sum of \$337.50 as evidenced by the Bill of Particulars hereto attached and prayed to be read as a part hereto. That the said amount is now due and owing and although demand has been made upon defendant for payment of the same he has wholly refused and neglected so to do nor has any person acting in his name, place or stead paid any part thereof.

WHEREFORE, the premises considered, plaintiff claims of the defendant the sum of \$337.50 exclusive of all set offs and just grounds of defense besides costs of this suit.

(signed) MILDRED GAMES.

Subscribed and sworn to before me this 2nd day of August, 1934 .

(signed) BURDELLA E. SCARBOROUGH,
Notary Public, D. C.

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BILL OF PARTICULARS.

To arrears due under agreement	\$40.00
To meals	40.00
To furniture bill	70.00
To rent for apartment agreed to be paid by defendant	187.50
Total amount due	\$337.50
To costs of this suit,	
Total amount claimed	\$

(sgd.) GEORGE McNEIL,
Attorney for Plaintiff,
Columbian Building.

AFFIDAVIT OF DEFENSE.

IN THE MUNICIPAL COURT OF THE DISTRICT
OF COLUMBIA.

MILDRED GAMES,
814 22nd Street, Northwest,
Plaintiff,

vs.

J. FRANK BRADY,
Interstate Commerce Commis-
sion.

Defendant.

At Law No.
294-402.

District of Columbia, ss:

J. Frank Brady, being first duly sworn on oath de-
poses and says that he is the defendant herein and that

he has a good defense to all of the plaintiff's cause of action, which is as follows:

He denies that he owes the plaintiff any of the amount specified in the Bill of Particulars herein or any sum whatsoever.

(sgd.) J. FRANK BRADY.

Subscribed and sworn to before me this 10th day of September, 1934.

(sgd.) PRICIE N. EVANS,
Notary Public, D. C.

(Sgd.) W. B. O'CONNELL,
William B. O'Connell,
416 Fifth Street, N. W.,
Attorney for Defendant.

MOTION FOR A NEW TRIAL
IN THE MUNICIPAL COURT OF THE DISTRICT
OF COLUMBIA.

MILDRED GAMES,
814 22nd St., N. W.

Plaintiff,

vs.

J. FRANK BRADY,
Interstate Commerce Commis-
sion,

Defendant.

At Law No.
294-402.

139 Now comes the defendant, J. Frank Brady, by his attorney, and moves the Court for a new trial in the

above entitled cause, and for reasons therefore assigns the following:

1. That the finding is contrary to the evidence.
2. That the finding is contrary to the weight of the evidence.
3. That the finding was improvidently entered.
4. And for other and just reasons which will appear upon the hearing of this motion.

(sgd.) W. B. O'CONNELL,
 W. B. O'CONNELL,
Attorney for Defendant,
 707, 416 Fifth St., N. W.,
 District 3209.

AFFIDAVIT OF W. B. O'CONNELL,
 IN SUPPORT OF MOTION FOR A NEW TRIAL.
 IN THE MUNICIPAL COURT OF THE DISTRICT
 OF COLUMBIA.

MILDRED GAMES,		
	<i>Plaintiff,</i>	
vs.		
J. FRANK BRADY,	<i>Defendant.</i>	
		At Law No. 294-402

District of Columbia, ss:

W. B. O'Connell, being first duly sworn on oath deposes and says that he is the attorney for the defendant in the above entitled cause; that on to-wit, the 10th day of July, 1935, when this cause was called for trial, counsel for the plaintiff requested a continuance and

entered into negotiations with this affiant for the settlement of the case. Affiant further says that counsel for the plaintiff made an offer of settlement, which he said he would have his client accept, and requested affiant to prepare the necessary papers and release in accordance with the proposed settlement. Affiant further says that he immediately prepared these papers and forwarded them to the counsel for the plaintiff, and confidently awaited their return, one of the conditions of which was the dismissal of this cause. Affiant further says that relying solely on the good faith of the attorney for the plaintiff, he assumed that the case would not be heard on the 25th of July, 1935, the date to which it had been continued, and for this reason was not present at the trial of this cause. This affiant further says that the defendant herein has a good, just and meritorious defense to the whole of plaintiff's cause of action as set forth in the affidavit of defense, and that the plaintiff is not entitled to a judgment in the amount sued for herein, or in any amount whatsoever.

(sgd.) WILLIAM B. O'CONNELL.

Subscribed and sworn to before me this 30th day of July, A. D., 1935.

(sgd.) MILTON T. BROOME,
Notary Public, D. C.

140 MOTION IN ARREST OF JUDGMENT.
 IN THE MUNICIPAL COURT OF THE
 DISTRICT OF COLUMBIA.

MILDRED GAMES,

Plaintiff,

vs.

J. FRANK BRADY,

Defendant.

At Law No.
 294-402.

Now comes the defendant, J. Frank Brady, by his attorney, William B. O'Connell, and moves the Court to arrest the judgment heretofore filed herein as against him, and to enter a judgment in favor of the defendant, and for reasons therefor assigns the following:

1. That the agreement under which the claim of the plaintiff is made is void and illegal.
2. That there was no legal consideration for said agreement.

(sgd.) W. B. O'CONNELL,
 WILLIAM B. O'CONNELL,
Attorney for Defendant,
 416 Fifth Street, N. W.,
 District 6666.

IN THE MUNICIPAL COURT OF THE
DISTRICT OF COLUMBIA.

The 24th Day of October, 1935.

MILDRED GAMES,
vs.
J. FRANK BRADY.

No. 294-402.

The Clerk of said Court will
The above judgment has been paid in full.

MILDRED GAMES,
Attorney for

The Docket entries in the hereinbefore set out case
of Games vs. Brady are as follows:

- Sept. 24, 1934—Continued Oct. 1—Plaintiff.
- Oct. 1, 1934—Continued Oct. 9—Plaintiff.
- Oct. 9, 1934—Continued Oct. 17—Defendant.
- Oct. 17, 1934—Aff. of Def., Continued Nov. 5—De-
fendant.
- Nov. 5, 1934—Continued Nov. 16—Plaintiff.
- Nov. 16, 1934—No appearance.
- June 28, 1935—Continued July 11—Defendant.
- 141 July 11, 1935—Continued July 25—Plaintiff.
- July 25, 1935—Trial in Part finding for Plaintiff
\$75.00.
- July 30, 1935—Defendant files herein Motion for
New Trial to be submitted August 5, 1935—J. Cayton.
- Aug. 5, 1935—On Defendant's Motion ordered hear-
ing on Defendant's Motion for new trial extended to
Aug. 6, 1935—J. Cayton.

Aug 6, 1935—Defendant's motion for new trial granted. Finding entered herein on July 25, 1935 set aside, vacated and held for naught.

Aug. 6, 1935—Continued Aug. 27—Defendant.

Aug. 28, 1935—Continued Sept. 20—Defendant.

Sept. 20, 1935—Trial—Finding for Plaintiff for \$40.00.

Sept. 27, 1935—Defendant's motion in arrest of judgment filed herein, set for Oct. 2, 1935.

Oct. 9, 1935—Defendant's motion in arrest of judgment overruled. Further Judgment on finding entered for plaintiff for \$40.00 interest from date and costs.

Oct. 14, 1935—S. C. issued.

Oct. 28, 1935—Praecipe stating "The above judgment has been paid in full."

The record reflects that no application for a Writ of Error was made by the defendant and reflects further that the judgment was paid in full on, to-wit, Oct. 28, 1935.

4.

That all funds paid under the agreement hereinbefore referred to were used for the support and maintenance of said minor child.

5.

While none of the following testimony referred to in this paragraph was considered by the Court in respect of its conclusions of law and its judgment and decree herein, yet, after the verdict of the jury was received and "The motion of the defendants to set aside the verdict of the jury and for judgment or for new trial" was being heard by the Court the defendants offered in evidence a Certified

Birth Certificate of the District of Columbia which set forth that Jeanne Frances Games was born in Columbia Hospital on, to-wit, November 17, 1932 and the aforesaid birth certificate stated that the recorded parents were Mildred Games, mother, and Thomas Games, father. Plaintiff in response to this evidence offered a Certified Copy of a Decree of Divorce which had been entered in the Court of Common Pleas of Belmont County, Ohio, dated March 14, 1929, said Decree being entitled Mildred Games vs. Thomas Games, and which decree granted an absolute divorce to Mildred Games from Thomas R. Games.

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6.

That the premises deeded to the defendant, Anne J. Brady, by the decedent, J. Frank Brady, September 7, 1934, were purchased in 1919 and that she and the decedent, J. Frank Brady, occupied it as their home until the year 1934, but in the year 1931 they ceased to live together as man and wife and the defendant, Anne J. Brady, has continuously rented rooms therein and since 1931 until the present time she has occupied the said premises and from 1931 to the date of the death of the aforesaid, J. Frank Brady, in November, 1936 she augmented her income of \$160.00 per month which she received from the said J. Frank Brady, by renting rooms, and that she has continuously since the death of the aforesaid J. Frank Brady occupied the premises in question and has continued to rent rooms therein.

7.

That on, to-wit, the 5th day of January, 1926, the defendant Anne J. Brady, deposited in the Potomac Savings Bank in Washington, D. C., the sum of \$5,000.25 and on the same day had a check certified and charged against her account payable to the American Security and Trust

Co., which said certified check was used to pay a first trust of \$5,000.00 with accrued interest there and then a lien on the realty described in paragraph three of this Finding of Fact; that the official records of the Potomac Savings Bank which reflected the foregoing information further reflected that at no time prior to January 5, 1926 or subsequent thereto, for the several years the defendant, Anne J. Brady, carried an account in said bank, the average balance said Anne J. Brady did not exceed \$300.00.

8.

That the deed transferring the property herein involved to the defendant, Anne J. Brady was executed on the 7th day of September, 1934 and duly recorded on the same day in the office of the Recorder of Deeds for the District of Columbia.

143 That the Court propounded the following questions to the jury and their answers to these questions are as set forth:

Question 1. On September 7, 1934, at the time J. Frank Brady executed a deed of premises 2900 P Street, N. W., in this City, to his wife, Anne J. Brady, did he do so with intent to hinder, delay or defraud the plaintiff, Mildred Games, with respect to her claims or demands under the paper writing signed by the said J. Frank Brady and the said Mildred Games on December 21, 1933?

And the jury, in answer to this question, said "YES."

Question 2. If you find there was an intent on the part of J. Frank Brady to hinder, delay or defraud the plaintiff in respect of her said claims, did his wife, Anne J. Brady, have notice or knowledge of such intent prior to, or at the time of, the transfer to her of the aforesaid property?

And the jury, in answer to this question, said "NO."

Question 3. In the purchase of the 2900 P Street property did Mr. Brady use \$3,500 of money belonging to his wife and which had been acquired by her other than from him?

And the jury, in answer to this question, said "NO."

Question 4. In paying off the first trust on said property, was the \$5,150 used for this purpose money which belonged to Mrs. Brady and which had been acquired by her other than from Mr. Brady?

And the jury, in answer to this question, said "NO."

And the Court ratified this finding.

CONCLUSIONS OF LAW.

1.

The agreement entered into by and between the plaintiff and J. Frank Brady, deceased, on to-wit, December 21, 1933 is a valid and subsisting contract.

2.

J. Frank Brady perpetrated a fraud on the plaintiff, Mildred Games, in order to delay, hinder or defraud her in the collection of the amount due to her under the aforementioned contract.

3.

That a judgment and decree in favor of the plaintiff be entered against the defendants for:

1. The sum of \$2,750.00 together with interest at the rate of 6% to date, and the costs of this action.

144 2. That the transfer of title to premises 2900 P Street, N. W. to Anne J. Brady by deed dated September 7, 1934 and recorded among the land records of the Dis-

trict of Columbia at Liber 6823 at folio 413 *et seq.* and being further described as:

“Lot numbered 212 in Danenhower’s Subdivision of lot numbered 206 in Square numbered 1258 formerly square numbered 88 in ‘Georgetown’, as per plat recorded in the office of the Surveyor for the District of Columbia in Liber A. R. S. at folio 251; subject to the right of way over the rear three feet of said lot for the use of lots numbered 210 to 213 in said subdivision.”

is hereby vacated, cancelled, set aside and held for naught.

BOLITHA J. LAWS,
Justice.

145

Judgment and Decree.

Book 27 Page 582

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

Filed Jun 9-1941 Charles E. Stewart, Clerk.

MILDRED GAMES,

Plaintiff,

vs.

JOHN FRANCIS BRADY, *et al.*,

Defendants.

Civil Action
No. 2508.

This action came on for hearing at this term and thereupon upon consideration thereof, it is, this 9th day of June, 1941.

146 ADJUDGED as follows, that the defendant, John Francis Brady, Administrator, pay to the plaintiff the principal sum of Two thousand seven hundred fifty (\$2,750.00) Dollars, said sum being the total of the monthly payments of Fifty (\$50.00) Dollars each from November 15, 1936 to June 15, 1941, and interest on each Fifty (\$50.00) dollar monthly payment aforesaid, at the rate of six (6%) per centum per annum, from their respective due dates, until paid, plus the costs of this action, and

BE IT ADJUDGED AND DECREED that a certain agreement referred to in these proceedings previously executed by and between Mildred Games, plaintiff and J. Frank Brady, decedent, is a valid and subsisting contract.

BE IT FURTHER DECREED that the transfer of title to premises 2900 P Street, Northwest, Washington, D. C. by deed dated September 7, 1934 and recorded the same date in the Land Records of the District of Columbia at liber 6823, folio 413, *et seq.* and being further described as follows:

“Lot numbered 212 in Danenhower’s Subdivision of Lot numbered 206 in Square numbered 1258 formerly square numbered 88 in ‘Georgetown’, as per plat recorded in the office of the Surveyor for the District of Columbia in Liber A. R. S. at folio 251; subject to the right of way over the rear three feet of said lot for the use of lots numbered 210 to 213 in said subdivision; subject to a deed of trust on said property for the sum of \$1,000.00, to his wife, Anne J. Brady; ‘without consideration’.”

is hereby vacated, cancelled, set aside and held for naught,
and

Book 27, Page 583.

BE IT FURTHER DECREED that the judgment and decree entered herein be and the same hereby is declared a lien on the hereinbefore described property.

BOLITHA J. LAWS,
Justice.

147 **Motion for a New Trial and/or Rehearing.**

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

Filed Jun 17, 1941 Charles E. Stewart, Clerk.

MILDRED GAMES,

Plaintiff,

vs.

JOHN FRANCIS BRADY, *et al.*,

Defendants.

Civil Action No. 2508.

Now come the defendants by their attorneys and move the Court to grant a new trial and/or a rehearing herein, and for reasons therefor assign the following:

1. That the judgment and decree entered herein is contrary to the evidence.
2. That the judgment and decree herein is contrary to the weight of the evidence.
3. That the Court erred in permitting improper argument to the jury.

4. For other and just reasons which will appear at the hearing of this motion.

WILLIAM B. O'CONNELL,
WILLIAM B. O'CONNELL.
WILLIAM A. GALLAGHER.
WILLIAM A. GALLAGHER.

Copy of the foregoing motion mailed
John C. Shaw, Investment Building,
Washington, D. C., on June 17, 1941.

**148 Order Overruled Motion for New Trial to Set Aside
Verdict and for Judgment for Defendant.**

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.

Filed Jun 27, 1941 Charles E. Stewart, Clerk.

MILDRED GAMES,

Plaintiff,

vs.

JOHN FRANCIS BRADY, Admr. and
ANNE J. BRADY,

Defendants.

Civil Action No. 2508.

Upon the coming on for hearing of the motion filed herein by defendant to set aside verdict, for judgment for defendant and, for a new trial, it is this 27th day of June, 1941, ordered that said motion be, and the same is, hereby overruled.

CHARLES E. STEWART,
Clerk,

By C. B. COFFIN
Assistant Clerk.

By direction
Justice Laws

150 **Statement of Points Relied Upon on Appeal.****IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA.**

Filed Jul 16, 1941 Charles E. Stewart, Clerk

MILDRED GAMES,

Plaintiff,

vs.

JOHN FRANCIS BRADY, and ANNE
J. BRADY,*Defendants.*

Civil Action No. 2508.

1. The Court erred in denying the motions of the defendants to dismiss the Bill of Complaint.
2. The Court erred in denying the motion of the defendants for a Bill of Particulars.
3. The Court erred in not submitting to the jury the issues of fact properly triable by the jury.
4. The Court erred in refusing to submit to the jury, under proper instructions, the validity of the alleged agreement.
5. The Court erred in refusing to direct a verdict in favor of the defendant, Anne J. Brady.
6. The Court erred in refusing to direct a verdict in favor of the defendant, John Francis Brady.
7. The Court erred in refusing to find that a resulting trust existed in favor of the defendant, Anne J. Brady, by reason of the fact that she paid the entire purchase money of the property involved.

8. The Court erred in its ruling that it was not necessary for the plaintiff to show valuable consideration for the alleged agreement, which agreement admittedly was not under seal.

9. The Court erred in holding that the judgment of the District of Columbia Municipal Court in Case No. 294-402, Games vs. Brady, was *res adjudicata* as to the validity of the so-called agreement in issue herein.

WM. B. O'CONNELL,
WM. B. O'CONNELL,
WM. A. GALLAGHER,
WM. A. GALLAGHER,
Attorneys for Defendants,
203 Union Trust Building,
Washington, D. C.

22 Excerpts From Testimony and Proceedings.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Filed Jul 25, 1941 Charles E. Stewart, Clerk.

MILDRED GAMES,

Plaintiff,

v.

JOHN FRANCIS BRADY, etc., ANNE
J. BRADY,

Defendants.

Civil Action No. 2508.

• • • • •

PROCEEDINGS.

(Following the impaneling of a jury, an opening statement on behalf of the plaintiff was made by Mr. Shaw, and

counsel for the defendants reserved their opening statement. The following then occurred:)

EVIDENCE ON BEHALF OF THE PLAINTIFF.

* * * * *

The Court: Members of the jury, this is a copy of the contract which the parties stipulate was entered into between the plaintiff, Mildred Games, and the deceased party, J. F. Brady, whose interests are represented in this case by his administrator, John Francis Brady.

Mr. Gallagher: If your Honor please, of course that does not cover any admission as to the legality of the contract or its enforceability.

The Court: Well, I suppose I will have to pass on that myself.

* * * * *

Thereupon MILDRED V. GAMES.

23 Direct Examination:

Q. Will you please state your full name? A. Mildred Virginia Games, 1305 Tenth St., N. W.

* * * * *

Q. Are you the same Mildred Games who entered into the contract just read, with J. Frank Brady? A. Yes, sir.

* * * * *

Q. All right. Mrs. Games, subsequent to entering into that contract, were certain payments made to you by Mr. Brady? A. Yes, sir.

Q. Do you recall the amounts of those?

* * * * *

Q. After you entered into the contract, did Mr. Brady make any payments to you under this contract? A. Yes, sir.

Q. Do you recall the amounts of those? A. \$50.

* * * * *

Q. (Interposing) Prior to making the \$50 monthly payments, did he pay you any stipulated amount in cash? A. \$500 cash and \$250.

* * * * *

24 Q. And then he continued making payments of \$50 a month subsequent to that, did he not? A. He continued for a time.

Q. Did there come a time when he ceased making those payments? A. Yes, sir.

Q. Will you tell us approximately when that was? A. It was not very long after the contract was signed. I don't remember exactly.

Q. As a result of that, what action did you take? A. I entered a suit against him in Municipal Court, for the arrears on the agreement.

* * * * *

Q. Subsequent to entering into this agreement and your filing suit in the Municipal Court, did there come a time when Mr. Brady began making payments again? A. Yes, he began making them again.

* * * * *

By the Court:

Q. With respect to this \$500 cash that was paid you, did he give \$250 in promissory notes? A. Yes, sir.

25 Q. Did he pay those all off? A. Yes.

* * * * *

By Mr. Hunter:

Q. Subsequent to that, he continued making the payment to you of \$50 monthly; is that correct? A. Yes, he paid after I sued him. He stopped payment shortly
26 after the contract, and started sending \$10 a month. He said \$10 was all he had to send.

Q. And that was subsequent to the agreement, also? A. Yes, sir.

Mr. Hunter: I believe that is all, Mr. O'Connell.

By the Court:

Q. As of the time of his death, was he in arrears any?

A. He did not pay for the month he died.

* * * * *

By the Court:

Q. That would be November, 1936? A. Yes, sir.

Q. Were all the other payments made up to then? A. Yes, sir.

* * * * *

Thereupon THOMAS R. GAMES, JR.

Direct Examination by Mr. Hunter:

Q. Will you please state your full name? A. Thomas R. Games, Jr., 1305 10th St. N. W.

* * * * *

27 Q. Is this lady sitting to my right (indicating) your mother? A. That is right, sir.

Q. Were you acquainted with one John Frank Brady? A. Yes.

* * * * *

Q. Mr. Games, coming on down to a more recent date, did you move to Washington at the same time your mother did? A. No; I came to Washington after she had been here approximately three or four months, I believe.

31 Q. Did you take up your residence with your mother at that time? A. That is right, sir.

Q. Where was that? A. At that time it was 1502 Vermont Avenue, Northwest.

32 Q. Did Mr. Brady live there? A. He was there most of the time.

Q. Did you know of an agreement entered into between your mother and Mr. Brady? A. I was—yes, I had knowl-

edge of it, and also I was there at the time that they came down to take her up to the lawyer's office to sign it.

Q. Subsequent to that agreement did you overhear any conversations between Mr. Brady and your mother, relative to that agreement?

Mr. O'Connell: I object to that, if your Honor please. He is attempting to do indirectly what he cannot do directly.

The Court: Is that the conversation that you said you were going to bring out?

Mr. Hunter: That is right, your Honor.

The Court: The objection is overruled.

Mr. O'Connell: I ask for an exception, please.

The Witness: Well, I had heard Mr. Brady repeatedly say that if she did not—

Mr. O'Connell (interposing): Your Honor, I ask that the witness be required to state the time and place of these conversations, and not just indulge in generalities.

The Court: You may bring that out on cross-examination. He said, "repeatedly".

33 By the Court:

Q. If you can tell the occasions where and about when, it will help us. A. Well, before the contract was signed, at our apartment at Corcoran Courts, on Twenty-third Street, he had said that if she did not sign the contract he would see that she never obtained anything out of his estate or pertaining to anything that he would have later on—and also afterwards, many times, at our apartment on Twelfth Street. In other words, it was just a question of him more or less forcing her to do—

* * * * *

By Mr. Hunter:

Q. Do you know where Mr. Brady died? A. In Emergency Hospital.

Q. Do you know where he was immediately prior to his death? A. At our apartment on Twelfth Street. He was removed from there to the hospital, and I happened to be there at the time he was removed.

* * * * *

34 CROSS EXAMINATION by Mr. O'Connell:

Q. Do you know where Mr. Brady lived when you came to Washington? A. He was at our apartment several times. I do not know his residence.

Q. Did you ever make any investigation to see where his home was or whether he had a home in Washington? A. No, sir; I had not.

Q. Did you ever? A. No, sir.

Q. You do not know yet whether he ever had a home in Washington? A. I know now that he did.

Q. When did you first learn that? A. Well, I would say two or three years ago, about two years ago.

35 Q. Some time prior to his death? A. After his death.

Q. After his death? A. Yes.

Q. That was the first time you knew anything about his having any property? A. That is the first time I knew he owned any property.

Q. Did you ever hear him discuss with your mother whether he owned any property or real estate, prior to his death?

* * * * *

BETTY WILLIAMS, was called as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hunter:

Q. Please state your full name? A. Betty Williams.

* * * * *

Q. Do you know the plaintiff, Mrs. Games, seated here (indicating)? A. Yes.

Q. How long have you known her? A. I have been knowing her about eight years.

Q. Directing your attention to some time in the early part of 1933, were you employed by Mrs. Games? A. Yes, sir.

Q. —as a maid?

* * * * *

36 Q. Did you know a man by the name of J. Frank Brady? A. Yes, sir, I certainly did.

Q. Where were you living at that time—that is, where was Mrs. Games living? A. She was living in Corcoran Courts, and I living on Twenty-second Street.

Q. Did you ever see Mr. Brady in the apartment in Corcoran Courts? A. Yes, sir.

Q. Were you present in the apartment in Corcoran Courts on the day when Mr. Brady came to take Mrs. Games to a lawyer's office? A. Yes, sir, I certainly was.

37 Q. Did you overhear any conversation at that time between the two parties? A. What is that?

Q. Did you overhear any conversation at that time between Mrs. Games and Mr. Brady? A. Yes, sir.

Q. Will you try to tell us in your own words just what that was? A. Well, I heard them say, after the contract was signed, that he was going to fix it for her not to get anything.

Q. You heard him say he would fix it so what? A. So she would not get anything.

Q. I see. Was that after having had some angry words? Was there any conversation prior to that? A. No, I don't think he was angry at the time. She had just come in from up there with him, when he said that and spoke the words.

Q. Do you know what brought that about? A. No, sir; I don't know exactly what it was. I was in the kitchen, and I heard him say that he would fix it in a way so that she would not get anything after the contract was signed.

Mr. Hunter: I believe that is all.

CROSS EXAMINATION by Mr. O'Connell:

Q. Were you employed at this apartment by Mrs. Games? A. Yes, sir.

38 Q. When did you first begin that employment? A. We was on C Street when I first commenced working for her.

* * * * *

Q. When was that? A. 1932; and then we moved around to Corcoran Courts in 1933.

Q. Who was there on C Street? A. I never knew anyone but Mrs. Games and the landlord and Miss Marie.

Q. Did you ever see Mr. Brady on C Street? A. Yes, sir; he was there every day I was there.

* * * * *

Q. Was he there all day? A. No, sir—just came in and out.

Q. What do you mean? A. Well, he would be there in the morning and in the evening.

Q. Did he stay all night? A. Not that I know; I was not there all night.

Q. What time did you get there in the morning? A. Around nine o'clock.

Q. Would he be there? A. No, he would be there at twelve.

39 Q. At twelve?

* * * * *

Q. How long were you there? A. I was there two years, off and on.

Q. Was he there? A. I was, and he was coming in, off and on, all the time.

* * * * *

Q. Practically every day? A. Yes, sir. And I was there with her two years, there.

Q. After she left Corcoran Courts, where did she go?
A. I just don't remember what street—she moved down on F Street.

* * * * *

A. She moved on F Street, and I moved on Twenty-fourth Street.

Q. Did you go along with her? A. No, sir; I moved on Twenty-fourth Street. But I still continued working for her.

Q. How long did you work for her? A. About eight years, off and on.

Q. Are you working for her now? A. No, sir.

40 Q. When did you stop working for her? A. In 1936; I stopped working for her in 1936.

* * * * *

4 By the Court:

Q. Do you remember when the contract was signed?

A. Yes, sir, but I don't remember exactly what date.

Q. You said you overheard a conversation after they got back, when he said he would fix it so she could not get anything? A. Yes, sir, so she could not get anything.

41 Q. When was the first time you talked about that afterwards? A. About two or three days after that, and I only talked to Mrs. Games.

The Court: All right.

By Mr. O'Connell:

Q. You remember when they came back from the lawyer's office? A. Yes, sir.

Q. Were you there before they went to the lawyer's office? A. Yes, sir; I was there with the baby.

Q. Who else was there? A. Nobody else but her son and the baby and me.

Q. How long were they gone? A. Not so long—about an hour and a half or two hours or something like that.

Q. Will you tell me exactly what you say he said? A. After they came back from signing the contract, he said he would fix a way so she would not get anything. That is what he said.

Q. Did he continue to come to the house regularly thereafter? A. Sure, when she would let him in. She was not supposed to let him in; but sometimes he would beat and bang on the door so she had to let him in.

42 Q. How often was that? A. I was working two or three days a week, and he would be there every day I was.

Q. How long did that continue? A. Until I quit working there, in 1936.

Q. How old a man was Mr. Brady, would you say? A. He looked to be around 60, to me; I never did know his age exactly.

* * * * *

Q. Do you know where Mr. Brady's home was? A. Yes, sir.

Q. Where was his home? A. On P Street.

* * * * *

Q. When did you first learn that? A. Well, during 1933.

* * * * *

Q. Do you know whether Mrs. Games knew that he lived there, in 1933? A. Sure. I passed the place that day with her, and she showed me. And that is the first I knew of it.

Q. In 1933 she mentioned it to you? A. Yes.

Q. Did she mention that he had a wife and family? A. No, sir, she did not, right at the time.

* * * * *

43 By Mr. O'Connell:

Q. When was the last time you saw Mr. Brady? A. I have not seen him since 1936.

Q. Did you see him just prior to the time he died? A. No, sir, I did not.

Q. You knew that he was maintaining that house and paying the rent and buying the groceries and things?

Mr. Hunter: If you know.

Mr. O'Connell: I asked if she knew.

The Witness: Mrs. Games was buying it.

By Mr. O'Connell:

Q. She paid you? A. Yes, sir.

Q. Was she employed, do you know? A. No, sir.

44 Q. She was not employed? A. No.

Q. When is the first time you ever saw Mr. Brady? A. The first day I went to work for Mrs. Games.

Q. Do you recall when that was? A. That was in November. I don't know exactly what day, but it was in November, 1932.

* * * * *

Q. Was Brady there then? A. Yes, sir.

* * * * *

Q. —up to the time you left, he was still there practically every day? A. Yes, sir.

* * * * *

45 ARTHUR C. MOON, was called as a witness by and on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hunter:

Q. Will you please state your full name? A. Arthur C. Moon.

Q. What is your employment? A. I am Chief of the Death Claims Section of the Retirement Division, Civil Service Commission.

* * * * *

Q. Do you have with you certain records of the Civil Service Commission relative to one J. Frank Brady? A. I have.

* * * * *

By Mr. Hunter:

46 Q. Will you examine your records, and can you tell from those records to whom the Civil Service retirement fund was originally made payable, upon his entry into the service? A. At the time that he entered into the Government service, of course, it becomes payable to his estate. After September 1, 1934, under an Act of Congress, an employee was permitted to name any person or persons to whom he wished the retirement deductions paid at death. Mr. John Frank Brady, on November 5, 1934, which was shortly after the beneficiary act was passed by the Congress of the United States, designated Anne Josephine Brady, wife, for one-half of the retirement deductions, and John Francis Brady, son, for the other half.

* * * * *

Q. Does the record show what his salary was in April of 1934? A. In what year?

Q. In April of 1934? A. In April of 1934?

47 Q. At the time he changed the beneficiary? A. His salary from June, 1930 to November 6, 1936, when he died, was \$4,600 for the entire period.

* * * * *

CROSS EXAMINATION by Mr. O'Connell:

* * * * *

Q. You say that prior to 1934, when the law itself made any retirement fund payable to the estate of the employee—is that right? A. Prior to this beneficiary act, of course, all moneys due a deceased employee were part of his estate. After September 1, 1934, they are still a part of his estate unless he takes advantage of that act and names someone to receive that money.

* * * * *

48 By Mr. O'Connell:

Q. You say his salary was \$4,600 a year? A. \$4,600 a year.

Q. It had been for a considerable period prior thereto, had it not? A. He was promoted to \$4,600 on July 3, 1930, and carried that salary up to the date of death.

Q. Prior to 1930, what was his salary? A. Prior to 1930 his salary was \$4,400, from January 1, 1927 to July 1, 1928.

* * * * *

49 Mr. Hunter: This is a certified copy of a deed from the Recorder of Deeds of the District of Columbia, showing that it was recorded on December 5, 1919, and that title to a certain piece of property, 2900 P Street, was deeded from one Calista B. Pierce and Charles B. Pierce, husband and wife, to J. Frank Brady. There is no mention of the title being given to anyone else.

I should like to submit this in evidence and should like to have permission for the jury to examine it.

* * * * *

50 Mr. Hunter: There is another deed, dated September 7, 1934, and recorded on the same date, wherein the same described property is transferred from J. Frank Brady to Anne Josephine Brady, for a described consideration of \$10.

* * * * *

6

Mr. Hunter: There is a deed of trust which was entered into at the same time as the second deed, September 7, 1934, securing the Perpetual Building & Loan Association for a \$1,000 loan.

The Court: That is signed by him—I mean whose obligation is it?

Mr. Hunter: By J. Frank Brady and wife, Anne J. Brady.

However, the title in the second deed was in Anne J. Brady's name.

* * * * *

51 Then, as of September 7, 1934, he conveyed the property to Anne J. Brady—that is his wife, is it?

Mr. Hunter: Yes, that is his wife.

The Court: And there was a recited consideration of \$10—a nominal consideration of \$10—and on that same day a deed of trust was given to the Perpetual Building & Loan Association, by Mr. Brady and his wife, securing this property, for a loan of \$1,000.

56

* * * * *

Mr. Hunter: At this time I should like to submit the contract.

* * * * *

Mr. Hunter: If the Court please, I have here records of a suit filed in the Municipal Court by the present plaintiff against the decedent.

* * * * *

MOTION FOR DIRECTED VERDICT ON BE-
BEHALF OF THE DEFENDANTS BY MR.
WILLIAM B. O'CONNELL.

(Mr. O'Connell thereupon moved the Court to direct a verdict on behalf of the defendants. At the conclusion of the discussion on the motion, the following occurred:)

The Court: I will overrule the motion, and you may renew it a little later on. I will probably take a verdict in this case, anyway, and will take it under 50-b, and then after that let you make your motion.

* * * * *

The Court: Recall the jury.

But I think you ought to prove your performance. I will permit you to reopen for that.

Mr. Hunter: We shall be glad to do that, your Honor.

* * * * *

FURTHER EVIDENCE ON BEHALF OF THE
PLAINTIFF.

The Court: Members of the jury, I have permitted the reopening of the case for slightly more testimony. It will take just a moment.

Mr. Hunter: Mrs. Games, please.

57 Thereupon

MRS. MILDRED GAMES:

Q. Mrs. Games, during the period of time when you were receiving funds from Mr. Brady, did you use those funds for the support—

* * * * *

Q. What did you do with the money that you received from Mr. Brady? A. I used it for the support of the child.

* * * * *

Q. Did you have any other source of income at that time? A. Yes, sir; I had roomers and my son was employed at Woodward & Lothrop's.

58 Q. Did you feed the child? A. Yes, sir.

Q. Did you clothe her? A. Yes, sir.

* * * * *

Q. Did your son at that time contribute anything toward your support? A. All of his pay.

Q. Is the child still living with you? A. Yes, sir.

Q. And has she been continuously residing with you since her birth? A. All the time.

* * * * *

FURTHER CROSS EXAMINATION by Mr. O'Connell:

Q. Is this \$50 a month that Mr. Brady gave you the only money he gave you? A. He bought some furniture for the apartment, because he lived there most of the time after the contract was signed.

* * * * *

Q. Did he give you any other money? A. Yes, sir; he did give me other money at times.

59 Q. And this \$50 you say you used exclusively for the child? A. I did.

Q. You never used that for yourself? A. No, sir.

Q. You never bought any groceries for yourself? A. No, sir; I had my son's salary.

* * * * *

Q. How much was he earning in 1934 and 1935? A. He started in at \$13, and then he earned \$18 immediately afterwards.

Q. And that \$50 and that \$18 were all the income you had? A. No, I had roomers.

Q. How many roomers did you have? A. Two.

Q. During all this time? A. Most of the time.

Q. How many rooms did you have at Corcoran Courts?
A. No, not at Corcoran Courts.

Q. How long did you live at Corcoran Courts? A. I lived there six months or eight.

60 Q. Where did you live prior to that time? A. At 2115 C Street.

Q. How many roomers did you have there? A. We did not have any roomers there.

Q. How long did you live there? A. A year. That was before the contract was signed.

* * * * *

By Mr. O'Connell:

Q. Tell me where you had roomers for that period of time and how much the roomers contributed to the upkeep of your establishment.

Mr. Shaw: I object to this question, if your Honor please. She has testified that she had an income from her son and had income from the person whose estate is now being sued.

The Court: I think it is proper to show it for the period of the payments.

Mr. Shaw: Payments during what time?

The Court: Confine your question to the period of the payments beginning in 1933 and down to the death of Mr. Brady.

By the Court:

Q. Where did you have roomers in that period? A. I had roomers at 1223 Tenth Street, Northwest, Apartment No. 4.

* * * * *

61 Q. How many? A. Two.

Q. For how long a period? A. Well, they were with me until after he died.

Q. When? A. Immediately after I moved there.

Q. When was that? A. I moved there in July or the last of June, I believe.

Q. What year? A. 1936.

Q. That is when you first took in those roomers? A. Yes.

* * * * *

The Court: All right. You may treat your motion as renewed; and I formally overrule it, and you may renew it later.

62 EVIDENCE ON BEHALF OF THE DEFENDANT.

J. C. BONIFANT was called as a witness by and on behalf of the defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Connell:

Q. Your name is J. C. Bonifant? A. That is right.

Q. Do you live in Washington? A. No, sir; I live in Virginia.

* * * * *

Q. During the year 1926 how were you employed? A. I was employed as a teller of the Potomac Savings Bank.

Q. Were you employed as a teller of the Potomac Savings Bank at Wisconsin Avenue and M Street?

* * * * *

63 Q. At any rate, the Potomac Bank is no longer in existence? A. That is right.

Q. I show you a piece of paper, here (indicating). Do

not state what it is, but do you identify that? A. (Examining the paper) Yes, sir.

* * * * *

Mr. Shaw: I will have to object if it is to be offered in evidence. It has no bearing on this case.

Mr. O'Connell. It might have.

Mr. Shaw: I should like to argue that, if your Honor please.

Mr. O'Connell: All right. Are you going to object to it?

Mr. Shaw: Absolutely.

Mr. O'Connell: All right; state your objection, then.

The Court: Let me see it, please.

(The paper referred to was examined by the Court.)

* * * * *

(Thereupon counsel for both sides approached the bench and conferred with the Court in a low tone of voice as follows:)

64 Mr. O'Connell: I expect to show by this witness that when they originally bought the property involved here, Mrs. Brady's money bought the house. There was a \$5,000 first trust on the house; and when that came due at the American Security & Trust Company, she went to her bank and got this certified check for \$5,150 and went down and paid the first trust note, to make that house clear.

The Court: She is going to connect this up with that?

Mr. O'Connell: I am going to show—

The Court (interposing). You are going to show the payment off of the trust on this P Street house?

Mr. O'Connell: On that day.

The Court: To pay off the trust on the P Street house?

Mr. O'Connell: Yes.

The Court: That seems to be proper.

Mr. Hunter: That appears not to be the best evidence.

Mr. O'Connell: I have the bank record there.

The Court: He has not offered the papers, as yet, but has just asked him if he can identify the paper; and then the paper itself may not be evidence.

Mr. O'Connell: That is the original bank record.

Mr. Shaw: We are concerned with the transaction which took place approximately eight years and one month later, after this is supposed to have occurred.

The Court: That would have to do with his motive. If a man's wife gave him \$10,000 to buy a house and then the man became involved in matters objectionable and distressing to his wife and then he attempted to turn over the house to his wife, that would be proper to show.

Mr. Shaw: But in 1934, one week and one day after the man had been sued, if he reconveyed—

65 The Court (interposing): That could be shown. But I understood that Mr. O'Connell is going to prove that he got this \$5,150 in 1926 and that she paid off the trust on this very house—which would be, it seems to me, evidence as to his state of mind in conveying that property to her.

Of course, you can argue the other points.

Mr. Shaw: Oh, I realize that full well.

Mr. O'Connell: And we will show that when this thing came up, he came to her and wanted money.

The Court: What about the other trust?

Mr. Gallagher: That \$1,000 was for money to pay under this contract.

The Court: I think I will permit it. You may have to prove the form of it. I will permit it, on further proof.

Mr. Shaw: I reserve my further objection.

(At the conclusion of the foregoing conference, counsel returned to the trial table and the following proceedings were had:)

Mr. O'Connell: Mark that for identification, please, as Defendants' Exhibit No. 1.

(Certified check on Potomac Savings Bank, \$5,150 was marked Defendants' Exhibit No. 1 for identification.)

By Mr. O'Connell:

Q. In whose handwriting is that (indicating a paper)?

A. My handwriting.

Q. What does that indicate? A. It indicates that a check drawn by Anne J. Brady was certified by my bank.

Q. To whom was the check payable? A. The American Security & Trust Company.

66 Q. What was the amount of the check? A. \$5,150.

Q. Have you another record there? A. I have the bank ledger sheet.

Q. Showing the account of Anne Brady? Does it show the account of Anne J. Brady in the Potomac Bank? A. Yes, sir.

* * * * *

By the Court:

Q. Do you recognize this lady as a lady who did business at the bank? A. Yes, sir.

Q. And do you recognize the signature as the signature of Anne J. Brady, whose signature you knew? A. Yes.

67 Q. Was that kept as a part of the regular bank records? A. Yes, sir.

Q. You do not remember that particular transaction yourself, do you? A. No, sir.

Q. (Continuing)—of your own recollection? A. No, sir.

Q. But this memorandum was made by you contemporaneously with it, was it? As of the time of the transaction, it was made in your handwriting, was it, as part of the business of the bank? A. Yes, sir; that is right.

Q. And that does convey to your mind what? A. That I certified that check.

Q. That you certified the check? A. Yes, sir.

* * * * *

By the Court:

Q. Do you know that this record is correct and that it was kept in the regular course of business, and as of the time of the transaction? Is that right? A. Yes.

The Court: I think it is proper to admit that.

By the Court:

Q. What is this that you have in your hand (indicating)?

A. The ledger sheet showing the transaction, where it was charged to her account.

68 Q. Are you familiar with these particular papers? A. Yes, sir; I worked for the bank at that time.

Q. I mean do you know that these are the original records of the bank itself? A. Yes, sir.

Q. Did you have anything to do with keeping them? A. Well, I worked for the Receiver for quite awhile after the Receiver took the records over, and I know that those are the actual records.

Q. These particular sheets that have been shown you were the regular sheets? A. Yes, sir.

Q. And they were kept in the regular course of business of the bank? A. Yes, sir.

The Court: I think that suffices. The materiality of it we may see.

By Mr. O'Connell:

Q. Referring to these records, will you tell me if these records are records of the account of Anne J. Brady at the Potomac Bank? A. Yes, sir.

Mr. Shaw: I object to his testifying about them. He has no authority for his having them in his possession. He has testified that he is in the gasoline business, and the Potomac Bank is still in the hands of the Receiver.

Mr. O'Connell: They are in here on subpoena *duces tecum*.

The Court: The objection is overruled.

69 By Mr. O'Connell:

Q. Will you look on that and see whether or not on the fifth day of January 1926, a check in the amount of five thousand and whatever it is was charged against the account of Anne J. Brady? A. This debit ticket was charged to Anne J. Brady.

Q. Does that show on these records? A. Yes, sir.

Q. Does it show on these records that on this fifth day of January a check in the amount of \$5,150 was charged to the account of Anne J. Brady? A. Yes, sir.

By the Court:

Q. Mr. Bonifant, you would not remember the particular transaction referred to in these ledger sheets of the bank, without looking at this particular paper, would you? A. No, sir, I would not know—except them.

Q. And after looking at the paper, that would not refresh your recollection? I mean you would not have any

recollection of the event, even by looking at the paper? A. No, sir; I cannot remember.

Q. So your testimony is that these particular papers, made in the regular course of business, show thus and so?

A. Yes, sir.

The Court: All right.

(The papers referred to were examined by Mr. Hunter.)

The Court: I do not think you had better put in any evidence except on that one item.

Mr. Hunter: On cross examination I want to develop what I can.

70 The Court: That is right—any of them that are pertinent.

CROSS EXAMINATION by Mr. Hunter:

Q. Can you tell me the date on which the withdrawal of the \$5,150 appears? A. January 5, 1926.

* * * * *

Q. Glancing to the other side of the ledger sheet, what is the balance on January 4, one day prior, according to this record? A. \$406.24.

Q. I see. That was the day prior to the withdrawal of a certified check; is that correct? A. Yes, sir.

Q. Glancing at the deposit column on January 5, what do you find was deposited in that account? A. A deposit of \$5,000.25.

* * * * *

Q. Is there anything to indicate there what that \$5,000 consisted of? A. No, sir.

Q. I see; but you do find a deposit of \$5,00.25 recorded on the 5th? A. Yes, sir.

Q. And you find a withdrawal of \$5,150 on the same day? A. Yes, sir.

* * * * *

72 Thereupon

PIERCE RIDDLE

was called as a witness by and on behalf of the defendants and, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Connell:

Q. Please state your full name, Mr. Riddle. A. Pierce Riddle.

Q. Where are you employed? A. The American Security & Trust Company.

* * * * *

Q. In response to a subpoena *duces tecum* did you bring some records from your bank? A. Yes (producing some papers.)

Q. What are those records? A. These records are a history of a real estate loan made by the American Security & Trust Company in 1923 to Mr. J. Frank Brady.

* * * * *

73 (The papers referred to were examined by Mr. Hunter.)

By Mr. O'Connell:

Q. You say that these are the records of a loan to Mr. J. Frank Brady? A. That is correct.

Q. Can you tell me the amount of that loan? A. \$5,000.

Q. When was that loan made? When do you say that loan was made? A. January 6, 1923.

* * * * *

Q. Can you tell, from that, if that loan has been paid? A. The loan was paid on January 6, 1926.

* * * * *

Q. Can you tell the manner in which it was paid—whether by check or what? A. It was paid by one check for \$5,150.

* * * * *

Q. Can you tell me, from looking at these records, on what property in the District of Columbia, if any, that loan was secured? A. On lot 212, square 1258.

Q. Improved by what premises? A. Known as 2900 P Street, Northwest.

* * * * *

By Mr. O'Connell:

Q. That notation there (indicating) is a record of the bank? A. That is just a formal record that it was paid. But this is the record of the note teller.

Q. Showing that it was paid on that particular date? A. Yes.

* * * * *

76

MRS. ANNE J. BRADY.

Direct Examination by the Court:

Q. What is your full name, please? A. Anna Josephine Brady.

* * * * *

Q. What is your relation to J. Frank Brady, deceased? A. I was his wife.

* * * * *

By Mr. O'Connell:

* * * * *

Q. And you live at 2900 P Street? A. Yes, sir.

Q. How long have you lived there? A. Since we bought the place.

Q. Do you recall approximately when that was? A. I think it was 20 or 21 years ago; I do not remember the dates.

* * * * *

Q. Will you please tell me the circumstances under which that house was bought in the first instance, and please tell me who bought it and when you bought it, and the

whole transaction? A. Well, he came down and looked around a long time for a house, and could not find any. And I came down and stayed at the hotel. Finally he came and said he had found a house. I looked at it and said, "Who wants that big place?" He said, "Well, it is the best I can do." I went in, and did not like it; but there was not much you could do about it.

Q. Was he employed here at that time? A. Yes.

Q. You had been living where? A. In Massachusetts, but I was stopping at the hotel here. So they told me he was going to keep it and renovate it and sell it. A year after we had started to renovate it we had a chance
77 to sell it for a good deal more than we paid; but he said we had to have a home, and he did not want to sell it. I did not want it, because it was too big.

Q. What was the down payment on the house? A. \$3,500.

Q. What was the sale price? A. \$8,500.

Q. Who paid the \$3,500? A. He did, but I happened to give him the money. I had a house up in Boston, that we just sold.

78 Q. That was your house in Boston? A. Well, I had his name on it, too; but the money was mine, that my mother left me. And then he wanted to buy a house down here; so I said, "All right, take it along with you." I never stopped to consider that there was anything crooked about him, one way or the other. Anything he said was all right.

Q. When he bought the house, you paid the original payment? A. Yes.

Q. There was a trust on it, I believe, of \$5,000? A. Yes.

Q. Did there come a time when the trust was paid off? A. Yes.

Q. Please tell me the circumstances when that was paid off? A. Mrs. Pierce wanted to buy another house, over in

Mt. Pleasant, and she said she would like him to clean up the note he had on the house, of \$5,000. He said, "Well, I have to go out and dig up somebody else or a bank to
79 take the mortgage over." I said, "What are you paying on it?" He said, "Six percent." I said, "That seems too bad. Why don't you pay the mortgage off?" He said, "I don't have the money." I said, "I have that, that I will let you have"—of course, I considered it as much mine as his. So I gave him the check for \$5,150 or \$5,158, or whatever it was. Of course, at that time Mr. Brady was all right, I think.

Q. At the time you gave him that check, do you remember where you got the check for the money?

* * * * *

A. Up at the Potomac Bank.

* * * * *

Q. That is when you were to get the check? A. Yes.

Q. That is the check you gave him? A. Yes.

Q. And that is the check that paid off the mortgage? A. Yes.

Q. Did there come a time when this house was transferred into your own name? Did there? A. Yes. Well, he always said he would transfer it in my name because, naturally, it was mine anyway.

* * * * *

80 Q. Did there come a time when this house was transferred to you? A. Yes.

Q. I think I may suggest to you that that was in September, 1934. Will you tell me the circumstances under which that transaction came about? A. Well, I called him up—at the time he was not living at home—and he called me up—well, first I came back from a visit up in Boston, and I found a postal card saying that the thousand dollars was ready for him whenever he would call down at the title company. I said, "That is funny. What in the world does he

want that for?" So I called up Mr. O'Connell and mentioned it to him. So he told me I had better call those people. And I went down and asked them; and they said he wanted to borrow a thousand dollars on the house. I said, "I am Mrs. Brady, and I don't want him to have it." So that automatically stopped that. He came home and found what I had done, and he called me and said, "I have got to have that thousand dollars." I said, "You are going to have a sweet time getting it." So he said, "If I don't get it I will blow my brains out." And it frightened me. Then he came up at noon and he told me he wanted that thousand dollars and that he intended now to square himself with me and turn the house back—turn the house over to me. So that is what happened. I don't know what he wanted the

81 thousand dollars for, but he was terribly upset about something.

Q. When that loan of a thousand dollars was put on the house, did you get any part of the thousand dollars? A. Do you mean get it back?

Q. Yes. A. Why, he paid some \$10 a month on it.

Q. I mean at the time the thousand dollars was put on there, who got the money? A. He did.

* * * * *

Q. Was that thousand dollars paid back? A. Well, he had started; he was paying \$10 a month. But he did not have \$200 paid on it when he died.

Q. Had it all been paid back at the time of his death? A. Oh, no.

Q. Do you know how much was still due at that time? A. Over \$800.

Q. Who paid that off? A. I did.

Q. Do you know what book (indicating) represents? A. That is what I had, paying it off by the month.

(The book referred to was examined by counsel for the plaintiff.)

* * * * *

82 Mr. O'Connell: This is a book with the Perpetual Building Association, Series 62, No. 5735, 2900 P Street, Northwest, in the name of J. Brank Brady.

By Mr. O'Connell:

Q. By referring to that book are you able to state the balance that was due at the time of his death? A. Not without looking at the book.

* * * * *

Q. Was that amount paid?

* * * * *

A. Yes.

Q. Who paid it? A. I did.

Q. I show you that (indicating a paper) and ask you if you know what that is. A. Oh, yes; that is the release for that.

(The release was examined by counsel for the plaintiff.)

* * * * *

By Mr. O'Connell:

Q. Whose signature is that (indicating on the paper)?

A. Mr. Brady's.

Q. Is that the note that you received when it was paid off, marked "Canceled"? A. Yes.

Q. By looking at that date can you tell the day when that was paid? A. (Examining the paper) December 1, 1936.

Q. When did Mr. Brady die?

* * * * *

Q. November, 1936? A. Yes.

83 Q. This was after his death? A. Yes.

* * * * *

(Book No. 5735, Series 62, Perpetual Building Association, in the name of J. Frank Brady, was marked Defendants' Exhibit No. 3 and received in evidence.)

(Release from mortgage on 2900 P Street was marked Defendants' Exhibit No. 4 and received in evidence.)

By Mr. O'Connell:

Q. During the time you had this house, certain interest payments were due on this trust—\$150 every six months?

A. Yes.

Q. Who paid that? A. Well, I paid a good deal of them—most of them.

Q. Is that check (indicating) in your handwriting?

A. Yes, indeed; yes.

Q. Both of these are in your handwriting (indicating)?

A. Yes.

Mr. O'Connell: I offer these checks. One is dated June 1, 1920, and one is dated November 29, 1921, and both are payable at the American Security & Trust Company, in the sum of \$150 each.

(Check of June 1, 1920, \$150, was marked Defendants' Exhibit No. 5 and received in evidence.)

84 (Check of November 29, 1921, \$150, was marked Defendants' Exhibit No. 6 and received in evidence.)

By Mr. O'Connell:

Q. Did Mr. Brady put in any money that was owed on the purchase price of this house at all? A. Not at all.

Q. Not at all? A. No. Mr. Brady did not have any money at the time.

Q. Did you ever know Mrs. Games? A. No.

Q. When was the first time you ever heard of her? A. Well, I am quite sure that it was when she sued Mr. Brady for breach of promise.

Q. You do recall that there was such a suit filed? A. Oh, yes.

Q. How did you learn of that? A. A neighbor brought

it in to me, to show it to me out of the paper. I would never have seen it if it was not for that.

Q. When the article appeared in the paper, that was the first you knew of it? A. The first time.

* * * * *

A. No.

85 Mr. O'Connell: Your Honor, the witness has testified that the first she knew of this was when the suit was filed. Here is the official record of the Court, and I want to use it to fix the date (indicating).

By the Court:

* * * * *

Mr. Hunter: We can stipulate that; it is May 1, 1935.

The Court: All right.

By Mr. O'Connell:

Q. May 1, 1935 is the first time you ever heard of Mrs. Games? A. Yes.

Q. When is the first time that you ever heard of this so-called agreement? A. When she sent somebody up with the paper to me.

Q. That was after he died? A. After he died, yes, indeed—almost a year after he died.

Q. That is the first time you knew anything about any agreement? A. Yes.

86 Q. At the time when this house was transferred to you by Mr. Brady, did you know of any creditors or anybody who had any claim against him? A. No, indeed.

5 Q. Was that transaction made for any purpose of cheating anybody? A. Oh, no.

Q. What was the sole purpose of it? A. Just that he owed it to me, I guess. That is all.

Q. He knew that you had paid for the house? A. He knew that I had paid for the house, and he thought he would square himself—for once.

Q. Are you still living in that house? A. Yes, indeed—making my living there.

Q. You have made your living there for a long while? A. Yes, I have.

Q. Taking in roomers? A. Yes.

Q. You live there with your son, do you? A. With my son.

Q. And at the present time you are renting rooms there? A. Yes.

Mr. O'Connell: I think that is all.

The Court: We shall take a recess until one-thirty.

(Thereupon, at 12:30 p. m., a recess was taken until 1:30 p. m. of the same day.)

87 After recess.

(The proceedings were resumed, pursuant to the recess, at 1:30 o'clock p. m.)

* * * * *

MRS. ANNE J. BRADY, one of the defendants herein, resumed the stand and was further examined and testified as follows:

Cross Examination by Mr. Shaw:

* * * * *

Q. As I understand your testimony, you stated that this house was purchased in 1919 or 1920, twenty to twenty-one years ago; is that correct? A. Something like that; yes.

88 Q. And the down payment was made out of funds that you received from a home? A. Yes.

Q. Where was that home located? A. Mattapan, Massachusetts.

* * * * *

Q. What was the sale price of the house? A. \$7,500, I believe.

Q. \$7,500? A. Yes, but I only had \$2,500 tied up in it; there was a \$5,000 mortgage on it.

Q. There was a \$5,000 mortgage on it? A. Yes. And then I had money in Springfield.

Q. Springfield? A. Yes.

Q. Was it in property or in the bank? A. In the bank—the Five and Ten Bank; and I had a thousand dollars in it and took it out.

Q. That entire \$3,500 you expended in the purchase of this house? A. Yes.

Q. At the time of the purchase did you know in whose name it was? A. Not at that time, but I trusted him then at that time, you know, and I knew it would be all right.

Q. And then later it was transferred to your name? A. Yes.

Q. At that time there was \$5,000 borrowed on the property? A. Yes.

Q. From whom was that borrowed? A. From the loan company.

89 Q. Was that to pay off Mrs. Peirce? A. Yes.

Q. Now I direct your attention to 1926: You testified that at that time you paid off the loan at the American Security & Trust Company? A. Yes.

Q. Did you examine those bank ledger sheets? A. No, I did not.

Q. Do you recall what your balance was at that time? A. No.

Q. Did you make a deposit around that time? A. Yes, I did.

Q. What was the amount of that deposit, do you recall?
A. Fifty-one hundred and something.

Q. You deposited \$5,100 in the bank? A. Yes.
90 * * * *

Q. Well, the \$5,000 is the important thing. From whom did you receive that \$5,000? A. From the Norwood Co-operative Bank.
* * * *

Q. Where is that located? A. Norwood, Massachusetts.

Q. Did you receive that by check? A. Yes.

Q. How did you receive that? A. I belonged to that bank for eleven years.

Q. Do you still belong to that bank? A. No.

Q. Is it still in existence? A. Oh, yes.
* * * *

Q. You testified that you kept roomers at this house?
A. I did.

Q. During what time was that? A. I always did.

Q. All during the time you lived there? A. Yes.

91 Q. How many on an average did you have? A. I had seven bedrooms, and there was just myself and my little boy. Mr. Brady traveled most of the time, and it was pretty lonesome for me—being a perfect stranger here. And I took in eight students from Georgetown and kept them for some years. Then since then, since I did pretty well with that, I continued that.

Q. Did Mr. Brady continue this support? A. Yes.
* * * *

92 Q. When was the first time that you became aware of the agreement between Mr. Brady and Mrs. Games, to the best of your knowledge? A. When the papers were presented to me after he died.

Q. After his death was the first time that you learned of the existence of Mrs. Games? A. No, indeed.

Q. When did you first learn of the relationship of Mrs. Games with Mr. Brady? A. When the suit was filed for breach of promise, and the neighbor brought in the article in the paper.

Q. About what date? A. I really could not say what date. I really could not say what date it was; but then she began annoying me, calling me on the phone. And I told him that if he did not stop it I would have to take other methods of doing it. She called me out of bed at two o'clock in the morning, telling me tales about him.

Q. Another question, Mrs. Brady: In 1934 there was a thousand dollars borrowed on this property? A. Yes.

Q. The borrowing of that thousand dollars coincided exactly with the date the property was deeded to you, did it not? A. Yes.

93 Q. Were you present at the title company when those papers were signed?

* * * * *

A. Yes.

Q. Did you sign it? A. Yes.

Q. Did you sign the note? A. I am sure I did—I may be wrong.

* * * * *

Q. June 1st and November 29th. You have stated that those were for interest on this property? A. Yes.

Q. Where did you get this money? A. I was making money.

94 Q. Can you definitely state that this was your money or what Mr. Brady gave you or your general community funds? A. We did not have any community funds for years. He paid me a certain amount and I made a certain amount.

Q. Just what amount did he pay you, to the best of your knowledge? A. \$160 a month.

* * * * *

Q. For how long did that arrangement continue? A. Until he died.

Q. When did it start? A. I think it was around 1931.

* * * * *

Q. How much had he been giving you prior to that time? A. Anything I wanted.

Q. I see. A. And then he changed his tactics.

Q. In 1931 something happened to disrupt your orderly life? A. Yes, to disrupt the whole life; yes.

Q. What was that? A. Well, I did not know for years.

Q. Did you separate from Mr. Brady in 1931? A. As far as living with him; yes.

* * * * *

95 A. But he was in the house.

Q. But you do not know why? A. I never knew why, until this thing came up.

Q. And you say you learned of this some time in 1935? A. Well, I really would not want to say what the date of that was.

Q. You testified it was when the suit was filed? A. Yes.

Q. For four years you were living with your husband but were living apart from him, but you did not know why? A. I did not; you could not get one thing out of him; he never would tell you anything.

Q. Did you have a signed agreement with him to pay you \$160 a month? A. No, indeed. I told him as long as he paid it I would leave him alone but if he stopped I would take action against him.

Q. At the time this \$5,000 trust was paid off on the property—in 1926, I believe? A. Yes, I think it was.

Q. At that time you withdrew certain funds from the Five and Ten Cent Savings Bank, in Springfield, Massachusetts, and paid off that trust? A. No, I think that—yes; that is right.

Q. No; I am sorry, but I believe you said the Norwood Cooperative Bank? A. Yes, that is right.

Q. And you paid off this trust at that time? A. Yes.

96 Q. Did you ascertain at that time whether or not the property was in your name? A. Oh, I knew it was not; but at that time he was all right, and it was all right with me to let him have the money.

Q. Then suddenly in 1931 something happened that caused you to live apart from him? A. Yes.

Q. Did you make any effort then to get the property in your name? A. No, because I thought he would do it. Mr. Brady was a very fine man in his time.

Q. Can you tell me why suddenly in 1934 it was put in your name? A. No. He was very definitely in need of some money.

Q. He put the property in your name and borrowed a thousand dollars, and he signed the note, and yet the property was in your name? A. He said he would put the \$10 a month back—as shown in that book.

* * * * *

97 Q. At the time this thousand dollars was borrowed by Mr. Brady on this property, he came and asked your permission, of course?

A. Yes, he wanted a thousand dollars; and I gave it to him.

* * * * *

Q. Was that the reason why this property was immediately thereafter deeded to you on the same day? A. No, I do not think so.

Q. Did you make that as a condition for your consenting to the loan? A. He just said if I gave it to him he was going to deed the property to me anyway and he might just as well then.

Q. He said he was going to deed the property to you? A. Yes. He said, "I know it is yours, and I have been a"—

Q. (Interposing) Did you know about Mrs. Games then? A. I don't think so.

Q. In 1934? A. Oh, yes, I did.

Q. Did you know that there was a suit filed against Mr. Brady, August 29, 1934, a week before this was done? A. I did not know there was any suit against Mr. Brady until I saw in the paper about the suit for breach of promise.

* * * * *

98 By Mr. Shaw:

Q. I believe you testified on direct examination that Mr. Brady never had any money; is that correct? A. Well, at the time the house was bought he did not have any money.

Q. Did he have any money subsequent to that? A. Yes, he did; he had \$6,000 in bonds.

* * * * *

Q. He was drawing a good salary during all that period of time? A. Yes.

* * * * *

99 Q. But at that time you were not living with him, were you? A. No.

Q. Did you live with him at all from 1931 until he died? A. I did not.

Q. You lived in the same house? A. Not all the time.

Q. But I mean when he was in town? A. No, no.

Q. Oh, he had another establishment in town? A. Yes.

Q. Do you know where that was? A. No.

Mr. Shaw: I think that is all.

RE-DIRECT EXAMINATION by Mr. O'Connell:

Q. Did there come a time when he stopped living at your house? A. Yes.

Q. About how long was that prior to the time he died?

A. Almost three years, I believe it was.

Q. Was that at or about the time when this property was transferred to you? A. No, it was long before this property was transferred.

Q. He had ceased living there entirely?

* * * * *

102 The Court: Members of the jury, you will only consider the date of this; and the date has a bearing on the time Mrs. Brady said she found out about some claim on behalf of the plaintiff against her husband. The outcome of it you do not concern yourselves with; because if we go into that we will have to go into a lot of explanations which do not have anything to do with this case.

Mr. Shaw: May it also be considered for another purpose: The terms of this contract covenanted that no suits would be filed; and on the face of the record it shows that this suit was filed and constituted a breach of the covenant and contract.

The Court: That would be for me to decide. The date of the suit and the fact of the filing of the suit are admitted, of course.

Mr. Shaw: Yes, your Honor.

* * * * *

103 The Court: You are trying to recover from 1936 on to date, and this child is not 21, and you have not shown her age, as yet.

Mr. Shaw: The pleadings show when the child was born.

Mr. O'Connell: I do not know when the child was born.

The Court: Did you admit it?

Mr. Shaw: I was not here at pretrial.

The Court: You are suing for the period from the date of his death down to—

Mr. O'Connell (interposing) To the date of the filing of the claim, which I believe amounts to \$1,500.

The Court: You are not claiming it during minority?

Mr. Shaw: There is an additional claim.

The Court: But that is not due now and you cannot get judgment on that.

Mr. Shaw: No.

Mr. Hunter: Assuming that we may be successful, in order to prevent a multiplicity of suits—

The Court (interposing): In nature it is in the form of a declaratory judgment based on the finding. But as to the validity of the contract, I do not think that there is any contest except as to the legality.

Mr. O'Connell: And there is a question here of the statute of limitations and laches.

104 The Court: That is all legal.

But unless you prove the age of this child and what her name is, I am afraid you will never be able to get it fixed.

She says, "In consideration of the support of my child". You have to show that the child referred to is hers and that she was born on such and such a date; because for all this jury and I know, she is 21.

Mr. O'Connell: I do not know what child they are talking about. It may be the boy who is 21.

The Court: That is you gentlemen's business, but you had better prove it.

Mr. Hunter: We can put her back on the stand and let her testify that that is the child.

The Court: As a matter of fact, I do not see much issue on the contract, do you?

Mr. Hunter: I see none.

The Court: I mean anything to submit to them?

Mr. Gallagher: No, except that there was a contract of that sort.

The Court: Well, you stipulated that.

Mr. Gallagher: Yes, that is agreed; and the question of whether it is valid is for your Honor to determine.

The Court: Yes. It seems to me that the only thing to submit to them in this case is the question of whether this conveyance in 1934, after this suit was filed, was a fraud. I do not think it comes under this conveyance to wife after creditors are known. It did not become a substantial debt. It was an obligation that was already due, so it does not go on that; and it will have to go on that fraud section.

Mr. O'Connell: If that be true, he never could have sold this property.

105 The Court: I will hear you; but my present judgment is that you have to go to the jury on this one section 11—whether this was done in fraud of creditors.

They do say that is a question of fact and not of law, so I had better not instruct on that; and that will be the whole thing that you will argue to the jury.

Mr. O'Connell: What would be the definition of a creditor at the time the contract was made and at the time of death?

The Court: There are many cases on the proposition that you may prove as to subsequent creditors. It is not only existing creditors but it is future

creditors. There are many Court of Appeals cases on that.

Mr. O'Connell: The Court of Appeals says that it can be set aside for fraud; any substantial creditor can get the benefit of that.

The Court: Well, I think all I can permit an argument on is the proposition of whether when he made this conveyance in 1934 he did it for the purpose of cheating and defrauding this woman out of what she might have expected under this contract. Of course, I will hear you on the other.

They can answer the question of whether she did that or not; that seems to be the way to submit that case.

Mr. O'Connell: Does she have to be a party to it?

Mr. Shaw: She does not have to, to make it a fraudulent conveyance.

The Court: I will apply the law later, as long as we agree on what you are going to submit and argue.

106 Mr. Gallagher: The jury must have some idea of what is meant by fraud, under the circumstances, and what the statute means.

The Court: I will define that.

Mr. Gallagher: And we can touch on those in our prayers.

The Court: I will take care of that. The ordinary fraud is the kind with intent to cheat somebody—in this circumstance—and by that particular I would it beyond the power of these women, as honest creditors, to deal with this property.

Mr. Gallagher: Then the question is whether she was an honest creditor. If the contract was invalid—

The Court interposing: You will have to assume—

Mr. Gallagher (interposing): Then your Honor will direct that the contract was valid and was supported by valuable considerations?

The Court: I do not know that I have to instruct them on that at all.

Well, I will consider the prayers on that point; but I will limit the argument to this fraud. That is what I am going to do. I do not want any argument on the validity of the contract.

Mr. Gallagher: There must be an injury to the party resulting from the alleged fraudulent contract.

The Court: As I see it, I can submit to this jury two questions, if necessary, and I can do it under the new rules: Was this conveyance made by the husband to the wife on such and such a date and made by the husband for the purpose and with the intent of cheating and defrauding the plaintiff out of her claims under this contract?

107 And I can put another question—if it is at all material—on the lines of this: In the event your answer is "No", you need not answer the next question. In the event your answer is "Yes," then you will further answer the question as to whether Mrs. Brady had any knowledge of the fraudulent character.

Now, what else do I need?

Mr. O'Connell: I think you should instruct them that if they believe that Mrs. Brady's money was the money that paid for the house, then she was the equitable owner.

The Court: I will instruct them that they may take all those surrounding facts into consideration in determining whether she was the owner.

Mr. Shaw: If they answer "Yes" and state that his executing of this deed was fraudulent, and then they say "No", meaning that she did not have anything to do with it, then we would have a rather paradoxical situation, because the conveyance was his conveyance.

The Court: If hers is material, I can take it into account; and if it is not material, I can ignore it. You say you want a declaratory judgment in this case; and it is my duty, under the rules, to see that the judgment is in the proper form. There was a case in the Court of Appeals that was reversed the other day because one of the Judges did not do that. I have to take it on myself to see that the verdict is in the proper form; but I have to have the findings of the jury in order to direct me to the proper form.

I do not think I need anything on the contract; there is no issue about it.

Mr. Gallagher: There is no issue as to its existence.

108 The Court: Well, you prove this other thing, and I will work on the prayers with you.

Mr. Shaw: All right.

Mr. Hunter: Are we to be limited to the present date or to the date of the filing of the suit?

The Court: I do not see how you could possibly recover any more than to the present date.

Mr. Hunter: Rather than to the date of the filing of the suit?

The Court: Well, I do not know what your claims are.

Mr. Shaw: It sets forth that there will be a recurring claim each month.

The Court: Well, I can look that up.

Mr. Hunter: We will show as to the child's being the same child?

The Court: I think you have to do it.

(At the conclusion of the foregoing conference, counsel returned to the trial table and the proceedings were resumed as follows:)

FURTHER EVIDENCE ON BEHALF OF THE PLAINTIFF.

Mr. Hunter: Mrs. Games, please.

Thereupon

MRS. MILDRED GAMES,

the plaintiff herein, was recalled for further examination, and was further examined and testified as follows:

Further Direct Examination by Mr. Hunter:

109 Q. Mrs. Games, directing your attention to this contract between you and Mr. Brady, in which there is mentioned the support of the minor child, is that minor child in the courtroom at the present time? A. Yes.

* * * * *

By the Court:

Q. Do you know what child it refers to? A. It is this child right back here in Court, your Honor (indicating.)

Q. What is her name? A. Jeanne Games.

* * * * *

Q. When was she born? A. She was born November 17, 1932.

Q. Where? A. In Columbia Hospital.

Q. In this city? A. Yes.

The Court: Very well.

Mr. O'Connell: I renew my objection, and I note an exception.

The Court: Very well; the objection is overruled.

By Mr. Hunter:

Q. What is Jeanne's present age? A. She is now eight years old.

* * * * *

111

CHARGE TO THE JURY.

The Court (Laws, J.): Members of the jury, the procedure that we shall follow in this case differs from that which as jurors you usually follow. In most cases it has been your experience, I am sure, that you have been asked to decide either in favor of the plaintiff, on the one hand, or in favor of the defendant, on the other hand. But that is not to be the procedure in this case.

Under the law, the judge may take the opinion and judgment of jurors with respect to issues and questions of fact which arise in a case; and in this particular case that is what the Court is asking you to do; and, therefore, you are going to be requested to answer certain questions which I have put in writing for your use, and they are four in number.

112 The first is: On September 7, 1934, at the time J.

Frank Brady executed a deed of premises 2900 P Street, Northwest, in this city, to his wife, Anne J. Brady, did he do so with intent to hinder, delay, or defraud the plaintiff, Mildred Games, with respect to her claims or demands under the paper-writing signed by the said J. Frank Brady and the said Mildred Games on December 21, 1933?

In the event your answer to that question is, No, it will not be necessary for you to answer question no. 2. However, if your answer to question no. 1 which I have just read to you is, Yes, then you will make answer to question no. 2, which is as follows:

113 (2) If you find there was an intent on the part of J. Frank Brady to hinder, delay, or defraud the plaintiff in respect to her said claims, did his wife, Anne J. Brady, have notice or knowledge of such intent prior to or at the time of the transfer to her of the aforesaid property?

Then the next two questions I want you to answer regardless of how you answer the first question; in other words, I want you to be sure to answer question no. 3 and question no. 4.

The third question is: In the purchase of the 2900 P Street property did Mr. Brady use \$3,500 of money belonging to his wife and which had been acquired by her other than from him?

The fourth question is: In paying off the first trust on the said property was the \$5,150 used for this purpose money which belonged to Mrs. Brady and which had been acquired by her other than from Mr. Brady?

114 With regard to this first question, which has to do with the intent on the part of J. Frank Brady, the Court instructs you that intent to defraud may be defined to be a design to prevent the property of an obligor or debtor from being applied to the payment of his debts. That is the intent to defraud.

There is also involved in this case a question, as you have noticed, doubtless, whether there was an intent to hinder or delay a creditor or claimant. An intent to hinder or delay may be defined as a design to obstruct or postpone the rights of a creditor being asserted against the debtor. Intent, as you know, is an emotion or operation of the mind, and it is possible to be shown only by acts and declarations or the circumstances surrounding the party charged with the intent. You can not look at a person and

read his intent. You can not define it or can not arrive at any idea concerning it except as his acts tend to show it or his statements or declarations tend to show it, or the circumstances under which he acts will tend to give light to what was his intent.

In this particular case the plaintiff contends that Mr. Brady, having been sued by her in the Municipal Court on or about August 29, 1934, for the sum of approximately \$250 or \$300, took steps to convey to his wife property which he owned, known as 2900 P Street, Northwest, in order that if judgment were obtained in respect to the claim in the Municipal Court or in the event any other claims should arise under this paper-writing dated December 21, 1933, Mrs. Games would not have recourse against this real estate or she would be hindered or delayed in having such recourse in order to collect her judgment or in order to realize from her claims.

115 In this connection the plaintiff points to the fact that the deed to Mrs. Brady was made on September 7, 1934, which is some nine days after the suit was filed in the Municipal Court. She also refers to testimony of her former maid that on the day the agreement was made between Mrs. Games and Mr. Brady for the support of the child Jeanne, Mr. Brady said he was "going to fix it" so Mrs. Games could not get anything. That is her side of it.

On the other hand, the defendant, Mrs. Brady, takes the position that the conveyance to her by her husband was made to her in recognition of obligation to her; at the time the P Street property was purchased the \$3,500 down payment was money which was paid on the property and which she had given him for the purpose of buying the house, and money which she had gotten out of her mother's estate; and, furthermore, when the first deed of trust was

paid off it was her money which was used for this purpose. She says she obtained \$3,500 of it from the Norwood Bank, in Massachusetts, where she had money on deposit; and the remaining \$150 she took out of money which she theretofore had in the Potomac Savings Bank in this city. In this connection she furthermore said that the same day the property was conveyed to her she permitted her husband to go through with obtaining a loan on the property so that he could get a thousand dollars; that while Mrs. Brady did not know of any claims of Mrs. Games, she did know Mr. Brady was greatly agitated about getting the thousand dollars; and she also claims that Mr. Brady had an adequate salary with which to meet his obligations to Mrs. Games.

For these reasons and possibly others that may have been in the evidence she asserts that the conveyance to her
 116 of the property was not with any wrongful intent on the part of Mr. Brady to hinder, delay, or defraud Mrs. Games.

In this connection counsel for the defendant have asked that I read to you an instruction which they prepared; and inasmuch as I think it correctly states the law, I shall do so, as follows:

“The jury is instructed that if they believe from the evidence that the property, 2900 P Street, Northwest, was purchased by funds furnished by the defendant, Mrs. Anne J. Brady, and that she claimed to be entitled to have it transferred to her, and if her husband made the conveyance to her in recognition of the fact that the home had been purchased by her and was claimed to be hers, rather than any attempt to hinder, delay, or defraud the plaintiff, then the conveyance was not with intent to defraud, and your answer to the first question would have to be, No.”

117 It is for you as jurors to draw the deductions from the facts in the case. What was the purpose of Mr. Brady at the time he made the conveyance of this real estate to his wife? Was it to hinder, delay, or defraud or defeat Mrs. Games in respect to any claim under this paper-writing, or was it simply in recognition of a claim, either legal or moral, by his wife, that she was entitled to the property by reason of substantial moneys which she had put into it?

That is the manner in which you are to approach the answering of this first question. As I have indicated to you, if you find there was no wrongful intention on the part of Mr. Brady, that is to say, that he had no intent to hinder, delay, or defraud Mrs. Games, then there is no necessity for your answering the second question.

118 However, if you do find that there was such an intent on his part it will then be your duty to advise the Court whether in your opinion Mrs. Brady had knowledge or previous notice, or knowledge or notice at the time of the conveyance, of this wrongful intent on the part of her husband. There has been no direct evidence in this case that she had any such knowledge; so, therefore, as was argued to you by counsel, if you arrive at the conclusion that she did have such knowledge or notice you would have to do so by inference from certain of the facts in the case.

In reaching an answer to the first question, that is to say, the question having to do with the intent of Mr. Brady, the Court instructs you that in order for you to find such an intent to hinder, delay, or defraud you must be convinced of it by what is known as a preponderance of the evidence; and the same rule will apply to answering the second question, if you find that you have to answer it. It

is the burden on the part of the plaintiff to show by a
119 preponderance of the evidence that Mrs. Brady had
notice of such an intent on the part of her husband.

The law does not presume that a party had a wrongful intent or a wrongful mind. I think you will find that in every experience you have in the courts you will come to the realization that the law looks upon people as having honest minds and doing honest things and doing fair things. So it starts out with the presumption in favor of honesty and square dealing. So anyone who says that there is a wrongful intent or a wrongful mind will have to carry the burden of proof.

120 However, when you come to answer the third and fourth questions you have a slightly different situation arising, or you may have a slightly different situation arising. Those are the questions which have to do as to whether it was Mrs. Brady's money which was used—her separate estate which was used—for the down purchase on the property, or for paying off the second trust, or both. In answering those questions you are instructed that it is the law that where property in the name of a husband is conveyed to his wife under suspicious circumstances, and the wife claims the property was bought with her funds, the burden falls upon the wife to establish her claim.

Now, I am not indicating to you that such suspicious circumstances existed in this case. I am not giving you any indication one way or the other on that. It would be proper for Mr. Brady to give his wife property which he owned outright, provided he did not have creditors; or if he did have creditors it would still be proper for him to convey part of his estate if he had sufficient assets remaining to pay his creditors.

But if you find he was embarrassed or under pressure of finances or there were other circumstances which in your judgment would give rise to suspicion as to why he conveyed the property to his wife, then since the wife asserts the conveyance was made because of a claim to the property which she had by reason of funds she had advanced out of her own estate, the burden would be on her to establish this fact or these facts to your satisfaction.

121 Now, summed up: You are instructed that it is the burden of the plaintiff, Mrs. Games, in arriving at an answer to the first and second questions, which have to do with a wrongful intent on the part of Mr. Brady and a knowledge of such wrongful intent on the part of Mrs. Brady—in respect to those two questions it is the duty of Mrs. Games to establish the fraud or the intent to defraud or the knowledge, to your satisfaction by a preponderance of the evidence.

121 However, in answering the third and fourth questions, you are instructed that if you think the circumstances of the transfer by Mr. Brady to Mrs. Brady create suspicion, then in respect to the assertion of Mrs. Brady that the money which was used to buy the property and pay off the first trust was her own money, you must be convinced by a preponderance of the evidence that her money was so used.

Of course, that would apply only in the event you thought the circumstances were suspicious. If you did not find anything suspicious about it at all, then your approach to that problem would be different. You would judge of that situation as a normal or natural or reasonable event. But if taking into consideration all the surrounding conditions, they look suspicious to you and the circumstances look suspicious, and then the wife comes in and says, "Well, it was

my money that was involved in this property," then you would say, "Well, in light of those suspicious circumstances we are going to have to let her bear the burden of proof so far as her claim is concerned."

Perhaps I should define to you that wherever the burden of proof is involved, whether on one side or the other, the law means that he who has the burden of proof must establish the asserted point by a preponderance of the evidence. The preponderance of the evidence means that
 122 if the evidence in your judgment balances, then you decide against the man or the party who has the burden of proof. In other words, if the plaintiff in respect to these first two questions has the burden of proof, as she does, to show the intent or the knowledge, if you find the evidence balances, then you would have to answer the questions, "No." Because in order for her to prevail, her testimony must preponderate, which means it must outweigh in your judgment the testimony given by the other side.

You are to approach the answer to the third and fourth questions in the same manner, so far as the burden of proof is concerned. If you find that this conveyance was made under suspicious circumstances, and then you want to find out whether Mrs. Brady's money was used, the burden is on her to show if it was used; and if you felt it balanced, then your answer would be, "No." If you felt that her testimony outweighed the other testimony or the deductions from the facts—there was no other direct testimony—if you decided they outweighed it, then your answer would be in favor of Mrs. Brady.

But if you felt that they balanced or that the other outweighed it, then your answer would be in favor of Mrs. Games.

I think that covers it pretty well. Have you any suggestions?

Mr. Hunter: No, your Honor.

Mr. Shaw: No, your Honor.

The Court: If not, I will hand you these written questions and some instructions about it; and you will take them and select your foreman, and arrive at a unanimous verdict.

(Thereupon, at 11.38 a. m., the jury retired, to consider of their verdict.)

The Court: We will recess until the return of the jury.

BRIEF FOR APPELLEE, MILDRED GAMES

IN THE United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

UNITED STATES
APRIL TERM, 1941 COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

No. 8010

FILED NOV 13 1941

JOHN F. BRADY and ANNE J. BRADY, *Appellants*

v.

MILDRED GAMES, *Appellee*

Appeal from the District Court of the United States
for the District of Columbia

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Washington, D. C.

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IN THE
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FOR THE DISTRICT OF COLUMBIA

APRIL TERM, 1941.

No. 8010.

JOHN F. BRADY AND ANNE J. BRADY, *Appellants*

v.

MILDRED GAMES, *Appellee*

**Appeal from the District Court of the United States
for the District of Columbia.**

BRIEF FOR APPELLEE.

Counter Statement of Case.

Appellee is in accord with the statement of the case contained in the brief of Appellants, with the following exceptions:

1. As to the reference to the Breach of Promise suit filed on May 1, 1935, and the following statement that the same was "*dismissed*" on April 29, 1935, contained on page two (2) of appellants' statement of the case, it is apparent that

appellants meant April 29, 1936, and the record of said case shows that the plaintiff Mildred Games, took a voluntary non-suit on that date.

2. Concerning the reference to the death of J. Frank Brady, contained on page two (2) of appellants' statement of the case, it is to be observed that while John F. Brady died testate on, to wit, November 6, 1936, his son, John F. Brady did not qualify as administrator C. T. A. until June 24, 1938.

3. On page four (4) of appellants' brief wherein a reference is made to the memorandum of the Court below (Appellants' App. 133), the following language from said memorandum should be included:

"While by reason of the foregoing, it seems not necessary to decide the point, nevertheless * * *"

4. There is nothing in the testimony to the effect that Brady was "Living at her (the appellee's) apartment practically all the time", nor was such a finding of fact made, but rather the testimony shows that Brady was a "frequent visitor", to the appellee's apartment. (*cf.* Testimony of Betty Williams on Pages 54 and 55 of Appellants' App.)

5. The date on which the property in question was purchased by John F. Brady was December 5, 1919. (Appellants' App. 50.)

6. There is no testimony as to how long Mrs. Brady had been allegedly acquiring money in her alleged savings account, nor from what source, nor was any documentary evidence of a bank account in Massachusetts offered.

7. While the record of a suit filed by appellee in the Municipal Court, being *Games vs. Brady* No. 294402, reflected that the same was filed during August of 1934, it also showed that the case was not tried until September 20, 1935, and as a result of further delays judgment was not entered until October 9, 1935, and said judgment was not satisfied until October 28, 1935. (*cf.* Docket entries on page 39 of Appellants' brief.)

Statute and Rule of Civil Procedure Involved.

Code of Laws of the District of Columbia, Tit. 29 Chap. 8, Section 208:

Creditors to file suit within nine months from time claim is contested.

"If a claim be exhibited against an executor or administrator which he shall think it is his duty to dispute or reject, he may retain in his hands assets proportioned to the amount of the claim * * * and if on any claims exhibited and disputed as aforesaid the creditor or claimant shall not, within nine months after such dispute or rejection, commence a suit for recovery, the creditor shall be forever barred."

Federal Rules of Civil Procedure—Rule 39—Section C

Advisory Jury and Trial by Consent. In all actions not triable of right by a jury, the Court upon motion, or of its own initiative may try any issue with an advisory jury or, except in actions against the United States, when a statute of the United States provides for trial without a jury, with the consent of both parties may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

ARGUMENT.

I.

There was no error in the Court below denying Appellants' Motion to Dismiss or in lieu thereof to refuse to order the plaintiff to furnish a Bill of Particulars.

The complaint in the fifth paragraph states with particularity the fraudulent act that J. Frank Brady committed, viz. the transfer of all of his property to his wife for the purpose of defrauding and delaying the collection of the indebtedness evidenced by said "Agreement and Release." The allegations of the Complaint were definite and certain as to time and occasion and subject matter. What could be more particular in averment than this? Any further averment would be pleading evidence, and would be subject to attack as improper pleading.

As to the refusal of the Court below to grant the motion for a Bill of Particulars, your attention is respectfully directed to the case of *Lauer vs. D. C.*, 11 App. 453, wherein the rule was stated that the "granting of a motion for a Bill of Particulars is in the sound discretion of the trial court"; and to the case of *Craig vs. Parish*, 43 App. D. C. 447, wherein it is stated, "In general a bill of particulars is sufficient if information of the nature of the plaintiff's claim is given with sufficient certainty so that the defendant will not be misled or deceived on the trial."

If there was any element of surprise or deception that arose at the trial as a result of the averments of the Complaint, which appellee denies, the appellants' rights were adequately protected by the available provisions of the

Rules of Civil Procedure, specifically those rules contained in Chapter V, regarding Depositions and Discovery.

In the present case the Complaint set forth properly what the appellee intended to prove, and the same was set forth with sufficient certainty.

As to the delay in filing suit, said delay was quite sufficiently explained at the trial of the case and said explanation was as follows. The fraud was not discovered until some time after the death of J. Frank Brady, to wit, November 6, 1936, and while the will of Brady was filed for probate, no one qualified as executor until June 24, 1938, when John F. Brady qualified as Administrator C. T. A., and then refused the claim of plaintiff, and she brought her suit within the nine-month statutory period, provided by *Title 29, Chapter 8, Section 208, of the Code of Laws of the District of Columbia*.

The case of *Hardt vs. Heidmyer*, 152 U. S. 547, as quoted in appellants' brief on page twelve (12), is not the authority for the statement there set out, but rather, in the opinion of the above case, the case of *Stearns vs. Page*, 1 Story page 204, is quoted with approval. Appellee is in accord that same is a proper statement of the rule of law where it is apparent on the face of the pleadings, or as a fact, that there has been an unreasonable delay between the date of the alleged fraudulent transfer, and the date of filing the suit to set same aside; such is not the case here, but rather the Complaint shows on its face that while the transfer of the property in question occurred September 7, 1934, the payments in accordance with the terms of the contract were made up to the time of Brady's death, with the exception of that period for which suit was filed in Municipal

Court. While Brady's will was filed for probate, letters were not issued until June 22, 1938, and that thereafter plaintiff duly probated her claim against said estate, and said claim was rejected August 4, 1938, whereupon, within the nine-month statutory period, said suit was filed on, to wit, April 22, 1939.

As to the fact that the deed to Anne J. Brady was "openly made and openly recorded" as stated in appellants' brief at page eleven (11), line 28, it should be noted that the general rule regarding constructive notice as having a bearing on any possible laches is as follows. "Public records are constructive notice to plaintiff of their contents only where defendant has not been guilty of any affirmative act of deception to prevent suspicion and inquiry, but in cases of fraudulent concealment on the part of the defendant they do not operate as notice, unless inspection of them would reveal to a reasonably prudent man sufficient facts to put him on further inquiry." (21 C. J. Page 249—Section 247.)

See also:

Kessler v. Ensley Co., 123 Fed. 546.

Booker vs. Booker, 208 Ill. 529, 70 N. E. 709.

In the instant case the appellants' testator, by continuing his payments after the alleged fraudulent conveyance was entered into, was guilty of the "affirmative act of deception to prevent suspicion and inquiry."

The "sole ground of fraud" is not, as stated in appellants' brief on page twelve (12) thereof, that, "while a suit was pending in the Municipal Court, wherein Mrs. Games claimed \$40.00 as arrears under the agreement, Brady transferred his property." The further ground of fraud is

that for the purpose of defrauding the appellee and hindering and delaying her in the collection of indebtedness evidenced by the "Agreement and Release" Brady conveyed the property involved, with the result that if the conveyance is permitted to stand, the appellee and her minor daughter will be defrauded.

II.

Plaintiff by offering the "Agreement and Release" in evidence which stated a valid consideration, viz. the release of a claim, placed the burden on the appellants to show that the claim released was wrongful, illegal or without foundation, which burden was not sustained.

It is the position of the appellee that while the burden of proving consideration is on the plaintiff in the first instance, where there is a consideration recited in an instrument, as in this case, viz. release of a claim, said instrument being introduced into evidence, a *prima facie* case is made out, and the burden of proceeding shifts to him who claims that said recited consideration is void or voidable.

See:

In re Sheinman, 33 Fed. (2nd) 901.

Cowen vs. Hauck Mfg. Co., 249 Fed. 285.

The appellants failed to carry this burden, nor did they offer any evidence bearing upon the validity of the consideration for said "Agreement and Release."

In volume 22 *Corpus Juris* at page 210 it is stated that, "the position of the burden of the evidence, or as it is sometimes termed the burden of going forward with the evi-

dence, is controlled by the logical necessities of making proof which a party is under at the time, the burden being always on the party against whom the decision of the tribunal would be given if no further evidence were introduced. It is therefore the position of the appellee that when the "Agreement and Release" referred to in the Complaint, and appended thereto as an exhibit, was placed in evidence by the appellee she had then established a *prima facie* case so far as the question of consideration is concerned, and the burden of proceeding was then placed on the appellants to rebut this recited consideration. Since no evidence was adduced by the appellants to rebut this recited consideration, the appellee established her case in this respect.

The clear distinction between the present case and that of *In re Greene*, 45 Fed. (2nd) 428, cited by appellants as being "almost on all fours with the present case", is that in the cited case evidence was adduced purporting to show the nature of the claim released, and it was found to be an unlawful claim. In the present case no such evidence was adduced although it was incumbent upon the appellants to attack the validity of the consideration, they failed to do so.

There is no evidence in the case below purporting to show any adulterous relationship, nor that any claim growing out of such a relationship was the type of claim released, as consideration for the "Agreement and Release." As far as the evidence adduced in the lower court is concerned said consideration might have been, and was perfectly valid.

The cases cited by the appellants in support of the second section of their argument are not applicable because a *prima facie* case was made out on the "Agreement and Re-

lease'' and no evidence challenging the validity of the agreement, or consideration for the same, was offered by the appellants.

III. and V.

The Court below committed no error in failing to direct a verdict in favor of Anne J. Brady, nor was any error committed in not finding a Resulting Trust in her favor.

Appellee established a *prima facie* case against Anne J. Brady in that she alleged and proved that said Anne J. Brady was the party to whom Frank Brady deeded the property involved, after having had said property in his name solely, for a period of about fifteen years, for a nominal recited consideration, and that about the same time, to-wit, November 5, 1934, said Brady designated Anne J. Brady and John Francis Brady as beneficiaries of his Civil Service Retirement fund, which fund had formerly been payable to his estate. Appellants state in their argument at page sixteen (16) line 11 that "Mrs. Brady testified that she paid the entire purchase price of the property. She established this by documentary evidence." The documentary evidence presented was not the best available evidence. Where were the records of the Norwood Cooperative Bank, where Mrs. Brady claimed to have deposited the five thousand dollars (\$5,000.00) she testified that she paid on the mortgage? Such records were certainly available and were not produced.

No wrongdoing on the part of Mrs. Brady was either alleged or proved, and it is the position of the appellee that none need be.

In Volume 27 *C. J.* page 509, the law as to voluntary conveyances is stated as follows:

“Where such conveyance is voluntary, that is, not based on a valuable consideration, the good faith of the *grantee* (Mrs. Brady) does not validate it, where it is otherwise fraudulent as to the grantor’s creditors, even though the grantee may be entirely innocent of any knowledge of the grantor’s fraudulent intent.”

See also:

Arthurs vs. Boyle, 131 Md. 59.

Richards vs. Richards, 98 Md. 136.

Goodman vs. Wineland, 61 Md. 449.

Foley vs. Bitter, 34 Md. 646.

It is the *motive* of the grantor and not the *knowledge* of the grantee which determines the validity of the transfer, and the following cases are submitted as being authority for the rule of law above outlined.

McKee vs. Smith, 255 Ill. 465.

King vs. Pazian, 38 Cal. App. 337.

Cushman vs. Noll, 242 Mass. 496.

Gold vs. Fleitman, 176 N. Y. S. 631.

Kinneson vs. Scott, 82 W. Va. 287.

Tobias vs. Adams, 201 Cal. 689.

C & A Co. vs. Ramsey, 50 S. D. 73.

While Mrs. Brady testified that she paid the entire purchase price of the property, the only documentary evidence offered showed that a certified check in the amount of five thousand one hundred and fifty dollars (\$5,150.00) was charged to the account of Anne J. Brady. The same evidence also showed that on the same day a deposit in the amount of five thousand dollars and twenty-five cents (\$5,000.25) was made to the credit of the account of Anne J.

Brady. No documentary evidence was offered to attempt to show the source of this unusual deposit. Further examination brought out that her average balance at all times in the Potomac Savings Bank (the source of the documentary evidence that *was* submitted) was never over three figures. When pressed further as to the source of the five thousand dollars and twenty-five cent (\$5,000.25) deposit, Mrs. Brady testified that the money came from the Norwood Cooperative Bank in Springfield, Massachusetts, which bank is still in existence and the records of which could have been introduced and would have been the best evidence of possession of these funds by a housewife, whose only income, as she testified, was one hundred and sixty dollars (\$160.00) a month from Brady, and whatever she received from renting rooms.

The possession of, and payment out of her personal funds, of the five thousand one hundred and fifty dollars (\$5,150.00) to the American Security and Trust Co. was a question of fact, properly triable by the advisory jury, and subject to the ratification of the lower court, said advisory jury having an opportunity to see Anne J. Brady on the witness stand and to take into consideration her demeanor. Due to the failure of Mrs. Brady to properly account for her acquisition of the funds in question, unless they came from her husband, the jury had the right to infer that she received the funds from her husband, and in answer to the following question:

“In paying off the first trust on said property, was the five thousand one hundred and fifty dollars (\$5,150.00), used for this purpose money which belonged to Mrs. Brady, and which had been acquired by her other than from Mr. Brady?”

the advisory jury said “NO.”

The lower Court committed no error in its submitted questions to the advisory jury, and taking from the jury an advisory opinion which the Court later ratified.

It was stipulated at the outset of the trial that the "Agreement and Release" tendered, was actually signed by the parties to the action, and was the contract upon which the action was based, so there was no question of fact to be determined by a jury as to said "Agreement and Release," and the validity thereof was a question of law for the lower Court to determine, and the lower Court properly held said "Agreement and Release" to be a valid and binding contract.

As to that portion of the case presenting an aspect properly triable in Equity, namely the setting aside of the deed in question, the lower Court exercised the right conferred upon it in the Rules of Civil Procedure, Rule 39, Section (c), wherein it is stated:

"In all actions not triable of right by a jury the Court upon motion, *or of its own initiative*, may try any issue with an advisory jury * * *."

The Court below in its instructions properly stated that, where property in the name of a husband is conveyed to his wife under suspicious circumstances, and the wife claims the property was bought with her funds, the burden falls upon the wife to establish her claim, this burden Anne J. Brady did not meet.

See:

Smith vs. Cook, 3 App. D. C. 387.

Turner vs. Gotwals, 15 App. D. C. 43.

Evans vs. Bell, 49 App. D. C. 238.

Goodman vs. Wineland, 61 Md. 449.

IV.

The appellee was not guilty of laches in pursuing her claim.

It is the position of the appellee that she cannot be held guilty of laches in this action and it is her desire to approach this question in a two-fold aspect.

1. Since the appellee could not bring an action to set aside the alleged fraudulent conveyance until the contract upon which her debt action is based was in default, then the proper time for consideration of any possible laches would begin to run on November 15, 1936, the date that the first payment after the death of J. Frank Brady fell due, rather than at the time the alleged fraudulent conveyance was entered, acknowledged and recorded, viz., Sept. 4, 1934.

Briefly review the progress of events from November 15, 1936, the date on which the first payment was due on the "Agreement and Release," after the death of J. Frank Brady, who died testate, on to-wit, November 6, 1936, his will was filed in the office of the Register of Wills shortly thereafter, but the party named as executrix, Anne J. Brady, one of the appellants in this case, waived her nominated right, and no one was appointed until June 24, 1938, when John Francis Brady was approved, and letters were granted to him as Administrator *Cum Testamento Annexo*, after the appellee had taken the necessary preliminary steps to be appointed Administratrix *C. T. A.* as a creditor of the decedent J. Frank Brady. A claim was filed in the probate branch of the District Court of the United States for the District of Columbia, which claim was denied by the attorney for the Administrator *C. T. A.* on August 4, 1938,

and the instant suit was filed April 22, 1939, within the nine-month statutory period allowed by the *Code of Laws for the District of Columbia* at Title 29, Chapter 8, Section 208.

2. In the event that the position of the appellants that the time to consider laches should start to run from the time of the alleged fraudulent transfer, or recordation thereof, is tenable, *a position with which the appellee is not in accord*, then the appellee still respectfully urges that she is not pursuing a stale claim, and submits the following cases for the Court's consideration.

In the case of *Chiswell vs. Johnson*, 55 App. D. C. Page 3, wherein there was a suit by the administrator of an estate to recover certain stock alleged to have been fraudulently transferred in 1908, and where the suit was filed in 1919, the Court held that an action by administrators to recover property belonging to decedent's estate to satisfy creditors, where fraud in transferring stock in question was actual, and there was no acquiescence in it, and the stock had not increased in value, and was not in the hands of an innocent party, said claim was not to be barred by laches.

In the case of *Nelson vs. Worthington*, 3 App. D. C. 503, the Court stated:

"Whether one who seeks the rescission of a contract or a completed sale for fraud is barred by laches depends upon the particular circumstances of each case; and a liberal extension of the rule is allowable where the delay has not been willful or exercised for an unfair purpose."

The Court stated further:

"No one questions the reasonable rule of Equity, that one seeking the rescission of a contract or a completed

sale for fraud, must act promptly, *i. e.* within a reasonable time after discovery; but constant difficulty lies in the ascertainment of this reasonable time. Necessarily there can be no fixed or determined number of days, weeks or months applied, like a statute of limitations, to all cases of the same general character; hence it follows that the period within which decisive action must be taken, varies in length according to the circumstances of each particular case; *expanding or contracting as justice administered with due regard to the observance of the general rule of diligence may demand.* “*Peculiar conditions* sometimes demand immediate action, brooking no delay beyond a reasonable time for consideration of and determination upon, the line of action to be taken. Others again, permit a liberal extension of time when the delay has not been willful or exercised for an unfair purpose.”

It is respectfully requested that the Court in determination of this question keep in mind the settled rule in this jurisdiction set out in the case of *George vs. Ford*, 36 App. D. C. 315, that “greater liberality is allowed in excusing delay where actual fraud is charged, than in other cases.” And further that there is no absolute rule as to what constitutes laches, each case being determined according to its own particular circumstances, and for authority therefor the following cases are submitted.

Walker vs. McIntyre, 41 App. 380.

Wren vs. Goodman, 39 App. 240.

Darlington vs. Turner, 24 App. 573.

21 Corpus Juris, Pg. 210 *et sequitur*.

Public records are constructive notice to plaintiff of their contents where defendant has not been guilty of any affirmative act of deception to prevent suspicion and inquiry, but in cases of fraudulent concealment on the part of defendant they do not operate as notice, unless an inspection

of them would reveal to a reasonably prudent man sufficient facts to put him on further inquiry.

21 C. J. Pg. 249, Section 247.

Kessler vs. Ensley Co., 123 Fed. 546.

Booker vs. Booker, 208 Ill. 529; 70 N. E. 709.

In the instant case the appellants' testator, by continuing his payments after the alleged fraudulent conveyance was guilty of the "affirmative act of deception to prevent suspicion and inquiry."

VI.

The Court below was justified in concluding in its Memorandum Opinion that the "Agreement and Release" was *Res Adjudicata*, although it was not necessary that it so conclude.

The Bill of Particulars in the Municipal Court of the District of Columbia in the case of Mildred Games vs. J. Frank Brady No. 294402 showed as the items claimed therein:

To arrears due under agreement.....	\$ 40.00
To meals	\$ 40.00
To furniture bill	\$ 70.00
To rent of apartment.....	\$187.50
	\$387.50

There was a finding for plaintiff, the present appellee, and from a consideration of the items claimed, it is apparent that the finding in the amount of forty dollars (\$40.00) could be for nothing else but the arrears under the agreement, since any other conclusion would include one or more of the items claimed, therefore the Court below committed

no error in stating, as it did, that "While by reason of the foregoing, it seems not necessary to decide the point, nevertheless, it appears to me that the question of the validity of the contract sued on was decided in case entitled *Mildred Games vs. J. Frank Brady*, No. 294402 in the Municipal Court of the District of Columbia, and is *res adjudicata*." No mention of this opinion of the lower Court appears in either the "Findings of Fact" or the "Conclusions of Law," and the decree is not based on this point, although appellee maintains that it might have been.

For the foregoing reasons the appellee respectfully suggests that the decree entered by the Court below should be affirmed.

Respectfully submitted,

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